*Together with Case No. 444, Badgley et al. v. Du Bois.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 400

CONSOLIDATED ROCK PRODUCTS CO., AND EDWARD E. HATCH AND LOUIS VAN GELDER, COMPOSING THE PREFERRED STOCKHOLDERS COMMITTEE OF CONSOLIDATED ROCK PRODUCTS CO., PETITIONERS,

E. BLOIS DU BOIS

No. 444

F. D. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT AND WALTER S. TAYLOR, COMPOSING THE UNION ROCK COMPANY BONDHOLDERS'. PROTECTIVE COMMITTEE, ET AL., PETITIONERS,

E. BLOIS DU BOIS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 6, 1946.

CERTIORARI GRANTED OCTOBER 28 1940.

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In the United States Circuit Court of Appeals For the Ninth Circuit.

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation, Debtor.

UNION ROCK COMPANY, a corporation,

Subsidiary,

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation, Subsidiary.

BLOIS DU BOIS, an objecting bondholder of record to the Plan of Reorganization,

Appellant,

CONSOLIDATED ROCK PRODUCTS CO., a corporation; F. B. BADG-LEV, COLONEL R. B. FRITH, T. FENTON KNIGHT, and WAL-TER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Appellant E. Blois duBois, an objecting bondholder of record:

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Los Angeles, California.

For Appellees F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee:

O'MELVENY, TULLER & MYERS, Esqs., HOMER I. MITCHELL, Esq.,

GRAHAM L. STERLING, Esq.,

433 South Spring Street,

Los Angeles, California.

For Appellees Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee:

GIBSON, DUNN & CRUTCHER, Esqs., THOMAS H. JOYCE, Esq., 634 South Spring Street,

Los Angeles, California.

For Appellees Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.:

STANLEY ARNDT, Esq., 458 South Spring Street,

Los Angeles, California.

For Appellee Consolidated Rock Products Co.:

LATHAM, WATKINS & BOUCHARD, Esqs.,

PAUL R. WATKINS, Esq.,

411 West Fifth Street,

Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To Consolidated Rock Products Co., a corporation; F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of November, A. D. 1938, pursuant to an order allowing appeal filed on Oct. 4, 1938, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 25816-H, Central Division, wherein E. Blois duBols, an objecting bondholder of record to the Plan of Reorganization confirmed in said cause, is appellant and you are appellees to show cause, if any there be, why the decree, order of judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable Harry A. Hollzer, United States District Judge for the Southern District of California, this 4th day of October A. D. 1938, and of the Independence of the United States, the one hundred and sixty third.

H. A. Hollzer

U. S. District Judge for the Southern District of California.

Service of a copy of the foregoing Citation, together with Copies of the Order Allowing Appeal, Petition for Leave to Appeal and Assignment of Errors is acknowledged this 8th day of October, 1938.

O'MELYENY, TULLER & MYERS,

By Milton A. Taylor

Attorneys for F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee.

GIBSON, DUNN & CRUTCHER;

By.....

Attorneys for Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee.

Received copy of the within documents. Oct 8 1938 GIBSON, DUNN & CRUTCHER Per I. J.

Received copy 10/8/38

Stanley Arndt

B

STANLEY ARNDT

Attorney for Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.

> LATHAM, WATKINS & BOUCHARD By D. C. Worley

Attorneys for Consolidated Rock Products Co.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 16 min. past 12 o'clock Oct. 11, 1938 A. M. By M. J. Sommer, Deputy Clerk.

UNITED STATES OF AMERICA, ss.

TO Consolidated Rock Products Co., a corporation; F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of November, A. D. 1938, pur suant to an order allowing appeal entered on October 10, 1938, in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, in that certain cause No. 9000, (No. 25816-H of the District Court of the United States, Southern District of California, Central Division), wherein E. Blois duBois, an objecting bondholder of record to the Plan of Reorganization confirmed in said cause is appellant, and you are. appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable CURTIS D. WILBUR, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 10th day of October A. D. 1938, and of the Independence of the United States, the one hundred and sixty third.

CURTIS D. WILBUR

Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit. Service of a copy of the foregoing citation, together with copies of the Order Allowing Appeal, Petition for Leave to Appeal and Assignment of Errors is acknowledged this 13th day of October, 1938.

O'MELVENY, TULLER & MYERS. BY MILTON A. TAYLOR

Attorneys for F. B. Badgley, Colonel R. E. Frith,
T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholder's
Protective Committee.

GIBSON, DUNN & CRUTCHER BY GEO. J. ARBLASTER

Attorneys for Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee.

Received above copies

STANLEY ARNOT

· B.

STANLEY ARNDT

Attorney for Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.

> LATHAM, WATKINS' & BOUCHARD BY D. C. WORLEY

Attorneys for Consolidated Rock Products Co.

[Endorsed]: Filed Dec. 22, 1938. R. S. Zimmerman, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALI-FORNIA CENTRAL DIVISION

In the Matter of CONSOLIDATED ROCK (In Proceedings for the. PRODUCTS CO., a Dela-) Reorganization of a ware corporation, Corporation. Debtor. No. 25816-H. UNION ROCK COMPANY. a corporation, PETITION OF DEBTOR AND Subsidiary, BONDHOLDERS' COMMITTEES and SUBMITTING PLAN OF CONSUMERS ROCK & REORGANIZATION GRAVEL COMPANY, INC., DATED a corporation, MARCH 15, 1937. Subsidiary.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

This petition of CONSOLIDATED ROCK PROD-UCTS CO., Debtor herein; and F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight, and Walter S. Taylor, as the UNION ROCK COMPANY BONDHOLDERS' PROTECTIVE COMMITTEE constituted by and acting under Union Rock Company Bondholders' Protective

Agreement dated as of May 23, 1935, between said Committee and such holders of First Mortgage Serial and Sinking Fund Gold Bonds of Union Rock Company as have become parties thereto in the manner therein provided: and Wm. D. Courtright, Fred L. Dreher, F. J. Gay, Alfred Ginoux, and Guy Witter, as the CONSUM-ERS ROCK & GRAVEL COMPANY, INC., BOND-HOLDERS' PROTECTIVE COMMITEE constituted by and acting under Consumers Rock & Gravel Company, Inc., Bondholders' Protective Agreement dated June 1, 1935, between said Committee and such holders of First Mortgage Sinking Fund Gold Bonds of Consumers Rock & Gravel Company, Inc., as have become parties, thereto in the manner therein provided (said Debtor and said bondholders' committees being hereinafter sometimes referred to as "petitioners"), respectfully shows that:

I

Petitioner Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee (hereinafter referred to as the "Consumers Committee") holds possession of \$802,500 principal amount of the above mentioned bonds of said Consumers Rock & Gravel Company, Inc. (hereinafter referred to as "consumers"), which have been and now are deposited with said petitioner under the terms of the above mentioned Consumers Bondholders' Protective Agreement, out of a total (including \$63,500 principal amount owned by Consolidated Rock Products Co.) of \$1,200,500 principal amount of said Consumers bonds now outstanding.

Petitioner Union-Rock Company B ndholders' Protective Committee (hereinafter referred to as the "Union Committee") is the legal owner of \$777,000 principal amount of the above mentioned bonds of said Union Rock

Company (hereinafter referred to as "Union"), which have been and now are deposited with said petitioner under the terms of the above mentioned Union Bondholders' Protective Agreement, out of a total (including \$102,500 principal amount held by Consolidated Rock Products Co.) of \$1,979,500 principal amount of said Union bonds now outstanding.

IT

. Consumers and Union have heretofore filed petitions in this proceeding stating that they are, respectively, corporations a majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly, by Consolidated Rock Products Co. (hereinafter referred to as "Consolidated"), the principal Debtor herein, and stating further that substantially all of the properties of Consumers and Union are operated by said principal Debtor under certain operating agreements, and stating further that Consumers and Union are, respectively, unable to meet their debts as they mature and that they desire to effect a plan of reorganization in connection with or as a part of the plan of reorganization of said principal Debtor; and said petitions of Consumers and Union have heretofore been duly approved by the court in these proceedings.

III.

As appears more fully elsewhere in these proceedings, Consolidated has outstanding preferred and common stocks, and also owns the outstanding stock of Union and the outstanding stock of Consumers the properties of which are subject to indentures securing the Union and Consumers bonds respectively. As a result of negotiations conducted almost continuously during the last two years

between representatives of Consolidated and the Consumers Committee and the Union Committee, a plan of reorganization dated March 15, 1937, has been adopted by the board of directors of Consolidated and by the Consumers Committee and by the Union Committee, a copy of which is attached hereto as Exhibit A and filed herewith, the Consumers Committee and Consolidated having abandoned the plans heretofore filed herein by them respectively.

IV.

The plan provides in general for the transfer of all of the properties of Consolidated, Consumers and Union to a new corporation which is to be organized for the pur-· pose, with a capital structure consisting of new bonds, new preferred stock, and new common stock. The aggregate principal amount of the new bonds is to be one-half of the aggregate principal amount of Consumers and Union bonds outstanding in the hands of the public, excluding the Consumers and Union bonds held by Con-s. solidated. Such new bonds are to be secured by new indenture covering substantially all of the properties of the new corporation. The new preferred stock is to be of the par value of \$50 per share, and its aggregate par value will equal the remaining one-half of the principal amount of the bonds of Union and Consumers outstanding in the hands of the public as aforesaid. The new common stock is to be of the par value of \$2 per share. The new bonds and the new preferred stock are each to be divided into two series, designated Series U and Series respectively. Each holder of a \$1,000 present Union bond will be entitled to receive a new \$500 Series U bond and 10 shares of new Series U preferred stock, together with warrants entitling him to purchase 20 shares of new

common stock at any time during a period of twe years at prices ranging from \$2 to \$6 per share. Each holder of a \$1,000 present Consumers bond will receive the same securities as the holder of a \$1,000 Union bond, except that his new bonds and preferred stock will be of Series C. Each holder of present preferred stock of Consolidated will be entitled to receive one share of new common stock for each shate of such preferred stock, and each holder of present common stock of Consolidated will be entitled to receive for each 5 shares of such present common stock a warrant entitling him to purchase one share of new common stock at any time within three months after the date of such warrant, at the price of \$1 per share.

The new bonds are to be dated as of April 1, 1937, and are to mature on April 1, 1957, and are to bear interest from April 1, 1937, regardless of the date of actual consummation of the plan, at the rate of five per cent per annum, payable out of available net income as defined in the plan, but such interest shall be cumulative. 'A sinking fund for the retirement of the new bonds is provided out of available net income, sufficient to retire annually approximately four per cent of the principal amount of the new bonds foriginally issued, on a cumulative basis. .Dividends on the new preferred stock are to be at the rate of five per cent per annum of its par value and are to be noncumulative until such time as the corresponding series of new bonds shall have been retired, and thereupon shall become cumulative. A sinking fund for the retirement of the new preferred stock is provided, which will not operate until the corresponding series of new bonds has been retired, and will then be sufficient to retire annually on a cumulative basis approximately four per

cent of the amount of new preferred stock originally issued.

The available net income of the new corporation, as defined in the plan, is to be divided into two equal parts, one of which is to be applied to servicing the new Series U bonds and preferred stock, and the other to servicing the new Series C bonds and preferred stock. Provision is also made for the application of proceeds to be received from the sale of nonessential properties, to the retirement of new bonds and preferred stock at the most advantageous prices obtainable, in a manner which should tend to equalize within a reasonable time the amounts of the respective series of the new bonds and preferred stock outstanding.

The voting rights on the stock of the new corporation will be divided in such a way that the holders of the new common stock will be entitled to elect five out of nine idirectors, and the holders of each of the series of new preferred stock will be entitled to elect two directors, with the result that the persons who are now stockholders of Consolidated will be entitled to elect five out of nine directors of the new corporation, and the persons who are now bondholders will be entitled to elect four out of the nine directors of the new corporation. The plan further provides that if the new corporation fails to make certain minimum payments by way of interest on the new bonds or dividends on the new preferred stock, the holders of the new preferred stock will become entitled to elect six out of the nine directors, and the common stockholders of the new corporation will then be entitled to elect three directors, thus affording to persons who are present bondholders the opportunity of obtaining voting control of the new corporation under circumstances which would appear to warrant such control.

Because of the divergent points of view of the representatives of the three groups of security holders who have negotiated the plan, the plan necessarily represents compromises on a number of important points. This has resulted in a degree of complexity believed to be unavoidable under the circumstances. Petitioners believe, however, that the plan is feasible and essentially fair to all of the security holders who will be affected thereby and that in providing the means of keeping all three of the properties together as an operating unit, while at the same time preserving the relative interests of the security holders, it will prove advantageous to all and will be substantially preferable to any alternative involving foreclosure or segregation of any one or more of the properties.

VI.

Neither the Union Committee nor the Consumers Committee intends to accept any additional bonds for deposit under their respective bondholders' protective agreements. With pect to bonds heretofore deposited, it is the intention of said committees to adopt the plan under their respective bondholders' protective agreements and mail to each depositor a copy of the plan, informing them that if they desire to approve the plan, they need take no affirmative action and the respective committees will accept the plan on their behalf; that if the depositors do not wish to approve the plan, they may advise their com-. mittee in writing of their dissent within thirty days and the committees will not accept the plan on behalf of any such dissenting depositor; and that any depositors who wish to withdraw their bonds from deposit may do so by filing with their depositary written notice of their intention to withdraw and by paying their pro rata share

of their committee's expenses incurred to the date of withdrawal. With respect to nondeposited bonds, said committees propose to submit to the holders thereof a copy of the plan, a form of written acceptance, and a letter of transmittal, with instructions that those holders who wish to accept the plan should execute the form of written acceptance and forward it, together with their bonds, to the bank appointed as escrow agent for the purpose of holding such bonds, with authority to such escrow agent to file the written acceptance in this proceeding on behalf of the accepting bondholder.

VII.

Petitioners have prepared and attach hereto as exhibits, in addition to the plan of reorganization, the following:

- EXHIBIT B—Union Committee's proposed letter to depositing bondholders, including a summary of the plan.
- EXHIBIT C—Union Committee's proposed letter to nondepositing bondholders, including a summary of the plan.
- EXHIBIT D—Proposed form of written acceptance for use by nondepositing Union bondholders.
- EXHIBIT E—Proposed form of letter of transmittal for use by nondepositing Union bondholders.
- TXHIBIT F—Dufficate copy of proposed form of letter of transmittal to be returned to accepting Union bondholders by company acting as escrow agent.

- EXHIBIT G—Consumers Committee's proposed letter to depositing bondholders, including a summary of the plan.
- EXHIBIT H—Consumers Committee's proposed letter to nondepositing bondholders, including a summary of the plan.
- EXHIBIT I—Proposed form of written acceptance for .

 use by nondepositing Consumers bondholders.
- EXHIBIT J—Proposed form of letter of transmittal for use by nondepositing Consumers bondholders.
- EXHIBIT K—Duplicate copy of proposed form of letter of transmittal to be returned to accepting Consumers bondholders by bank acting as escrow agent.
- EXHIBIT L—Proposed letter from Consolidated to its stockholders.
- EXHIBIT M—Proposed form of written acceptance of plan for use by Consolidated stockholders.
- EXHIBIT N—Proposed form of letter of transmittal for use by Consolidated stockholders.
- EXHIBIT O—Duplicate copy of proposed form of letter of transmittal to be returned to accepting Consolidated stockholders by escrow agent.

WHEREFORE, petitioners respectfully pray that this court make and enter its order authorizing petitioners to submit the plan of reorganization to the various security holders who will be affected thereby, and approving the procedure proposed to be followed by petitioners in soliciting acceptances of the plan, and approving the forms of the proposed letters of explanation, summary of the plan, forms of written acceptance of the plan, and letters of transmittal proposed to be mailed by petitioners to the security holders as hereinbefore set forth.

Dated at Los Angeles, California, April 16, 1937.

CONSOLIDATED ROCK PRODUCTS CO.

By Robt. Mitchell Its Vice President.

And J. R. Allder

Its Assistant Secretary.

Debtor.

LATHAM, WATKINS & BOUCHARD, By Paul R. Watkins

Attorneys for Consolidated Rock Products Co.

UNION ROCK COMPANY BOND-HOLDERS PROTECTIVE COM-MITTEE

By F. B. Badgley.

(F. B. Badgley)

R. E. Frith

(R. E. Frith):

T. Fenton Knight (T. Fenton Knight)

Walter S. Taylor (Walter S. Taylor)

Union Committee.

O'MELVENY, TULLER & MYERS,

And Graham L. Sterling, Jr.

Attorneys for Union Rock Company Bondholders' Protective Committee.

> CONSUMERS ROCK & GRAVEL COM-PANY, INC., BONDHOLDERS' PRO-TECTIVE COMMITTEE

> > By Wm. D. Courtright (Wm. D. Courtright)

Fred L. Dreher (Fred L. Dreher)

F. J. Gay

(F. J. Gay)

Guy Witter (Guy Witter)

Being a majority of the members of said Consumers Committee.

PETITIONERS.

GIBSON, DUNN & CRUTCHER.

By J. C. Macfarland

Attorneys for Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee.

STATE OF CALIFORNIA.

SS.

COUNTY OF LOS ANGELES

ROBT. MITCHELL, being duly sworn, deposes and says that CONSOLIDATED ROCK PRODUCTS CO., one of the petitioners in the foregoing petition, is a corporation and that affiant is an officer thereof, to wit, a vice president, and makes this verification for and on behalf of said corporation; that affiant has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

Robt. Mitchell

Subscribed and sworn to before me this 16 day of April, 1937.

[Seal]

George Rollnick

Notary Public in and for said County and State.

My Commission Expires August 30, 1937.

STATE OF CALIFORNIA (: SS.

COUNTY OF LOS ANGELES

T. FENTON KNIGHT, being duly sworn, deposes and says that he is a member of UNION ROCK COMPANY BONDHOLDERS' PROTECTIVE COMMITTEE, one of the petitioners in the foregoing petition, and makes this vertification for and on behalf of said Bondholders' Committee; that affiant has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

T. Fenton Knight

Subscribed and sworn to before me this 21st day of April, 1937.

[Seal]

Caroline E. Tracy

Notary Public in and for said County and State.

STATE OF CALIFORNIA (: SS.

COUNTY OF LOS ANGELES

GUY WITTER, being duly sworn, deposes and says that he is a member of CONSUMERS ROCK & GRAVEL COMPANY, INC., BONDHOLDERS' PROTECTIVE COMMITTEE, one of the petitioners in the foregoing petition, and makes this verification for and on behalf of said Bondholders' Committee; that affiant has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

Guy Witter

Subscribed and sworn to before me this 21st day of April, 1937.

[Seal]

Meredith Koch

Notary Public in and for said County and State,

My commission expires April 17, 1941:

[EXHIBIT A]

PLAN OF REORGANIZATION

FOR

CONSOLIDATED ROCK PRODUCTS CO.,

UNION ROCK COMPANY,

AND

CONSUMERS ROCK AND GRAVEL

COMPANY, INC.

. Submitted by

Consolidated Rock Products Co.,
Union Rock Company Bondholders' Committee
and

Consumers Rock and Gravel Company, Inc.
Bondholders' Committee.

Dated: March 15, 1937:

PLAN OF REORGANIZATION FOR

CONSOLIDATED ROCK PRODUCTS CO., UNION ROCK COMPANY,

AND

CONSUMERS ROCK AND GRAVEL COMPANY, INC.

ARTICLE I.

DEFINITIONS.

When used in this plan, unless the context otherwise requires, the following terms shall have the following meanings:

"Debtor" or "Consolidated" means Consolidated Rock Products Co., a Delaware corporation.

"Union" means Union Rock Company, a Delaware corporation.

"Consumers" means Consumers Rock and Gravel Company, Inc., a Delaware corporation.

"Union bonds" means bonds issued by Union, flated as of September 1, 1927, and known as its First Mortgage Serial and Sinking Fund Gold Bonds.

"Consumers bonds" means bonds issued by Consumers dated as of July 1, 1928, and known as its First Mortgage Sinking Fund Gold Bonds.

"Present Union indenture" means the trust indenture, dated as of September 1, 1927, executed by Union to Title Insurance and Trust Company, as trustee, for the purpose of securing the Union bonds, together with any and all supplements and/or amendments thereto.

"Present Consumers indenture" means the trust indenture dated as of July 1, 1928, executed by Consumers to Bank of Italy National Trust and Savings Association (to which Bank of America National Trust and Savings Association has heretofore duly succeeded), as trustee, for the purpose of securing the Consumers bonds, together with any and all supplements and/or amendments thereto.

"Union bondholders" means the owners and holders of bonds secured by the present Union indenture.

"Consumers bondholders" means the owners and holders of bonds secured by the present Consumers indenture.

"Union protective agreement" means the Union Rock Company Bondholders' Protective Agreement dated as of May 23, 1935, as now in effect or hereafter amended, providing for the deposit of the Union bonds, whereunder F. B. Badgley, Colonei R. E. Frith, T. Fenton Knight and Walter S. Taylor are the present committee members.

"Union Committee" means the committee, as now or hereafter constituted, created under the Union protective agreement.

"Consumers protective agreement" means the Bondholders' Protective Agreement dated as a June 1, 1935, as now in effect or hereafter amended, providing for the deposit of the Consumers bonds, whereunder Wm. D. Courtright, Fred L. Drehes, F. J. Gay, Alfred Ginoux and Guy Witter are the present committee members.

"Consumers Committee" means the committee, as now or hereafter constituted, created under the Consumers protective agreement.

"Present preferred stock" means the outstanding preferred stock of Debtor.

"Present common stock" means the outstanding common stock of Debtor.

"New bonds" means the new bonds to be issued pursuant to this plan.

"New indenture" means the indenture to be executed pursuant to this plan to secure the new bonds.

"New preferred stock" means the 5% preferred stock of the new corporation to be issued pursuant to this plan.

"Participating cerdificates" means certificates issued under the voting trust agreements to be executed pursuant to this plan, representing the new preferred stock held by the voting trustees under such voting trust agreements.

"New common stock" means the common stock of the new corporation to be issued pursuant to this plan.

"New corporation" means the new corporation to be formed pursuant to this plan, which is to acquire all properties of the Debtor, Union and Consumers, issue the new bonds and new stock, and execute the new indenture.

"Present Union trustee" means Title Insurance and Trust Company, or its successor, as trustee under the present Union indenture.

"Present Consumers trustee" means Bank of America National Trust and Savings Association, or its successor, as trustee under the present Consumers indenture.

"Trustee" means the Trustee under the new indenture.

"Section 77B" means Section 77B of the Act of Congress of July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States", as heretofore or hereafter amended.

"Reorganization proceedings" means the proceedings heretofore instituted in the United States District Court

for the Southern District of California, Central Division, for a reorganization of the Debtor, Consumers and Union under Section 77B.

"Court" means the court in the reorganization proceedings, and "judge" means the judge of said court.

"Creditors" shall include, for all purposes of the plan, its acceptance and confirmation, all holders of claims of whatever character against the Debtor or Union or Consumers, or the property of any or all of them, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under the Bankruptcy Act; and the term "claims" includes debts, securities other than stock, liens or other interest of whatever character.

"Union properties" means all properties, real or personal, tangible or intangible, owned by Union.

"Consumers properties" means all properties, real or personal, tangible or intangible, owned by Consumers.

"Consolidated properties" means all properties, real or personal, tangible or intangible, owned by Consolidated.

The term "approximately equal" as used herein with respect to the principal amounts of new bonds and new preferred stock of Series U and Series C which may be outstanding, means that the difference in aggregate principal amount or par value between the new bonds or new preferred stock of said series, respectively, outstanding shall be less than 1% of the aggregate principal amount or par value of both said series outstanding.

ARTICLE II.

INTRODUCTORY.

In 1929 and thereafter, the Debtor acquired and now owns and holds all of the outstanding stock of Union and Consumers, the properties of which are subject, respectively, to the present Union indenture and the present Consumers indenture. Since April 1, 1929, Debtor has been operating the properties of Union and Consumers. The Debtor is engaged in the business of producing, handling and selling sand, rock, gravel and other building materials throughout southern California.

The outstanding securities of the Debtor, Union and Consumers which are to be affected by this plan are:

- (a) Union bonds in the aggregate principal amount of \$1,979,500;
- (b) Consumers bonds in the aggregate principal amount of \$1,200,500;
- (c) 285,947 shares of present preferred stock of the Debtor, without par value;
- (d) 397,455 shares of present common stock of the Debtor, without par value.

Default was made in the payment of the principal of the Union bonds which became due and payable on September 1, 1933, September 1, 1934, September 1, 1935, and September 1, 1936, and such principal is now due and unpaid; and default was made in the payment of semiannual interest installments due and payable on the Union bonds on March 1, 1934, September 1, 1934, March 1, 1935, September 1, 1935, March 1, 1936, September

1, 1936, and March 1, 1937, and such interest installments are now due and unpaid.

Default was made in the payment of semiannual interest installments due and payable on the Consumers bonds on July 1, 1934, January 1, 1935, July 1, 1935, January 1, 1936, July 1, 1936 and January 1, 1937, and such interest installments are now due and unpaid.

On May 24, 1935, the Debtor filed a petition in the United States District Court for the Southern District of California, Central Division, for a reorganization of the Debtor pursuant to Section 77B; and on the same date Union and Consumers filed similar petitions in said court for reorganization in connection with or as a part of the reorganization of the Debtor. On May 24, 1935, the court entered orders respectively approving said petitions and adjudging that they were properly filed under Section 77B and that they were filed in good faith. By said orders and subsequent orders, duly made after notice to all interested persons, the Debtor has been left in possession of its properties and the properties of Union and Consumers.

ARTICLE III.

THE PLAN IN GENERAL®

The properties of Union, Consumers and Consolidated will be transferred to the new corporation free and clear of all claims of the Debtor, its stockholders and creditors, and free and clear of all claims of Union, Consumers, and their respective stockholders and creditors, except

those claims which are to be assumed by the new corporation as hereinafter expressly provided. The new corporation will have the following capitalization:

- (1) \$1,507,000 principal amount of new bonds. The new bonds will be divided into Series U and Series C comprising principal amounts of \$938,500 and \$568,500 respectively;
- (2) 30,140 shares of 5% preferred stock of the par value of \$50.00 per share. The preferred stock will be divided into Series U and Series C, comprising 18,770 and 11,370 shares respectively;
- (3) 425,718 shares of common stock of the par value of \$2 per share, of which
 - (a) 285,947 shares will be issued to the present preferred stockholders of the Debtor;
 - (b) 37,540 shares will be reserved for issuance
 - tupon the exercise of stock purchase warrants to be attached to the new preferred stock, Series U.
 - (c) 22,740 shares will be reserved for issuance upon exercise of stock purchase warrants to be attached to the new preferred stock, Series C;
 - (d) 79,491 shares will be reserved for issuance upon exercise of stock purchase warrants to be issued to the holders of the present common stock of the Debtor.

ARTICLE IV.

TREATMENT OF EXISTING SECURITY HOLDERS AND CREDITORS.

Bondholders. The rights of the holders of Union and Consumers bonds shall be modified and altered by the transfer to the new corporation of all properties of Union and Consumers, free and clear (except as aforesaid) of all claims of the Debtor, its creditors and stockholders, and free and clear of all claims of Union and Consumers, their stockholders and creditors, and by the issuance by the new corporation of new securities in exchange for the present bonds held by them as follows:

- (a) \$500 principal amount of new bonds, Series U;
- (b) 10 shares of new preferred stock, Series U, or participating certificates therefor;
- (c) Attached to each certificate for shares of new preferred stock (or participating certificate therefor) will be a non-detachable stock purchase warrant entitling the holder to purchase 2 shares of new common stock for each share of such preferred stock at any time before the expiration of five

years after the date of is-

For each \$1,000 principal amount of Union bonds, with all the appurtenant unpaid coupons maturing on or after March 1, 1934.

suance or prior to the redemption of the new preferred stock, whichever occurs earlier, at the following prices:

- first six months at \$2 per share;
- (2) If exercised during the second six months, at \$4 per share;
- (3) If exercised during the second year, at \$4.50 per share;
- (4) If exercised during the third year, at \$5 per share:
- (5) If exercised during the fourth year, at \$5.50 per share;
 - (6) If exercised during the fifth year, at \$6 per share.

Holders of Union bonds of the denomination of \$500 each will receive for each such bond one-half of the new securities to which a holder of a Union bond of the denomination of \$1,000 will be entitled.

(a) \$500 principal amount of new bonds, Series C;

(b) 10 shares of new preferred stock, Series C, or participating certificates therefor; For each \$1,000 principal amount of Consumers bonds, with all the appurtenant unpaid coupons maturing on or after July 1, 1934.

- (c) Attached to each certificate for shares of new preferred stock (or participating certificate therefor) will be a non-detachable stock purchase warrant entitling the holder to purchase 2 shares of new common stock for each share of such preferred stock at any time before the expiration of five years after the date of issuance or prior to the redemption of the new preferred stock. whichever occurs earlier, at the following prices:
 - (1) If exercised during the first six months, at \$2 per share;
 - (2) If exercised during the second six months, at \$4 per share;
 - (3) If exercised during the second year, at \$4.50 per share;
 - (4) If exercised during the third year, at \$5 per share;
 - (5) If exercised during the fourth year, at \$5.50 per share;
 - (6) If exercised during the fifth year, at \$6 per share.

Holders of Consumers bonds of the denomination of \$500 each will receive for each such bond one-half of the new securities to which a holder of a Consumers bond of the denomination of \$1,000 will be entitled.

Stockholders. The rights of the holders of the present preferred stock of the present common stock of the Debtor shall be modified and altered by the transfer to the new corporation of all of the Debtor's properties free and clear of all claims (except as aforesaid) of the Debtor, its stockholders and creditors, and by the issuance by the new corporation of new securities in exchange for the present preferred stock and the present common stock held by them as follows:

For each share of present preferred stock

One share of new common stock.

For each five shares of present common stock

A stock purchase warrant entitling the holder thereof, at any time within three months after its date, to purchase one share of new common stock at the price of \$1.00.

No fractional warrants or warrants for fractional shares shall be issued.

The plan will not become effective, subject to the provisions of the following paragraph, until it shall have been confirmed by the court and accepted in the manner provided in Section 77B by or on behalf of:

(1) The holders of at least 3/3 in amount of Union. bonds;

- (2) The holders of at least $\frac{2}{3}$ in amount of Consumers bonds:
- (3) The holders of at least a majority of the present preferred stock of the Debtor;
- (4) The holders of at least a majority of the present common stock of the Debtor; and
- (5). By the Debtor as the holder of at least a majority of the outstanding stock of Union and Consumers.

Upon such confirmation and acceptance the plan shall be binding upon all the holders of Union and Consumers bonds, and upon all the holders of the present preferred and common stock of the Debtor, including those who have not, as well as those who have accepted it, and on the Debtor, Union and Consumers; provided, however, that if the court in the reorganization proceedings shall determine that the Debtor or Union or Consumers is insolvent, or that any class of stockholders will not be materially and adversely affected by the plan, this plan may be confirmed and consummated without the consent of the stockholders of the Debtor or of Union or of Consumers, or any class thereof not so affected, as the case may be.

Oiner Creditors. The right of creditors of the Debtor or of Union or of Consumers (other than Union, Consumers, the holders of Union or Consumers bonds, the present Union trustee as the representative of Union bondholders, and the present Consumers trustee as the representative of Consumers bondholders) shall not be materially and adversely affected by the plan, provided their claims have either been allowed or their executory

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racts or leases with the Debtor or Union or Coners, as the case may be, shall have been affirmed and
gnized in the reorganization proceedings, or provided
claims are for current operating expenses, and the
corporation shall assume all such claims but shall not
me any claims which have not been so allowed, afed, or recognized or which are not claims for current
ating expenses.

ARTICLE V.

ALLOCATION OF NET INCOME.

ne net income of the new corporation, as hereinafter ed, shall be divided into two equal parts, and, subject the provisions hereinafter contained, and to the extent able, shall be applied according to the following dule of priorities:

amount equal to 50% of such net is come shall be

First: The payment of interest at the rate of 5% per annum on the new Series U bonds;

Second: The creation and maintenance of the sinking fund for new Series U bonds (see Article VI below);

Third: The payment of 5% dividends on the new series U preferred stock;

Fourth: The creation and maintenance of the sinking fund for the new Series U preferred stock (see Article VII below);

Fifth: Any moneys remaining shall be applied to the general corporate purposes of the new corporation.

An amount equal to 50% of such net income shall be applied to:

First: The payment of interest at the rate of 5% per annum on the new Series C.bonds;

Second: The creation and maintenance of the sinking fund for new Series C bonds (see Article VI below);

Third: The payment of 5% dividends on the new. Series C preferred stock;

Fourth: The creation and maintenance of the sinking fund for the new Scries C preferred stock (see Article VII below);

Fifth: Any moneys remaining shall be applied to the general corporate purposes of the new corporation.

Until such time as (but not thereafter) the aggregate principal amount of new Series U bonds outstanding shall be approximately equal to the aggregate principal amount of new Series C bonds outstanding, if the 50% of such available net income applicable to the smaller series of new bonds and new preferred stock in any year shall exceed the interest and sinking fund requirements of the new bonds of that series and the dividend requirements of the new preferred stock of that series, for that year, then the excess up to an amount equal to the difference between the total of such requirements for that series and the total of such requirements for the other and larger series of new bonds and new preferred stock shall be applied to the retirement of outstanding new bonds of either series by purchase on the open market or through calls for tenders, at the best prices obtainable, not exceeding the redemption price; and if new bonds of either series cannot be purchased at less than their redemption price, such excess up to the aforesaid amount shall be applied to the redemption of new bonds of the smaller series outstanding.

The new corporation shall not, however, pay any dividends on the new common stock without applying an equal amount to the retirement of new preferred stock, in addition to the sinking fund requirements with respect to such stock. Such retirement shall be accomplished by purchase at the lowest prices obtainable, not exceeding the redemption price, but if no preferred stock is offered at less than the redemption price thereor, then the new corporation shall call such stock for redemption by lot irrespective of series.

ARTICLE VI.

PROVISIONS OF NEW BONDS AND OF NEW TRUST INDENTURE.

1. The new bonds shall be dated as of April 1, 1937, and (subject to provisions for earlier maturity by reason of redemption, acceleration of maturity, or otherwise) shall mature twenty (20) years from their date. The authorized principal amount of new bonds shall be \$1,507,000. The new bonds shall bear interest at the rate of five per cent (5%) per annum, such interest to be payable semi-annually each year on October 1, and April 1, but shall be payable on such interest dates only if and to the extent that the net income of the new corporation for the semiannual period ended three (3) months preceding each respective interest payment date, available for the payment of interest, as hereinafter provided, shall suffice for such payment. Such interest shall be cumulative. The new indenture may provide that distributions of in-

terest to bondholders need be made only in multiples of one-fourth of one per cent (1/4 of 1%) of the principal amount of the outstanding new bonds, and that no such distribution need be made in an amount less than one per cent (1%) of such principal. Interest not earned and available, as aforesaid, in any semiannual period shall accumulate.

- The new bonds shall be secured by a new indenture in the nature of a trust deed and/or mortgage and chattel mortgage upon all of the property to be acquired by the new corporation (including all properties owned by subsidiaries of the Debtor or Union or Consumers), subject to the lien of taxes, any or all leases, easements, right-ofway, any encumbrance executed pursuant to Article XI hereof, and such other matters, if any, as may be approved or authorized by the Union Committee and the Consumers Committee, acting jointly. The new indenture shall be executed by the new corporation and shall designate as Trustee such bank or trust company as shall be selected by the Union Committee and the Consumers Committee, acting jointly, with such powers, duties, rights, privileges and immunities, not incondistent with the plan, as shall be provided in the new indenture. The Trustee shall be entitled to reasonable compensation for its services. Union and Consumers bonds received by the new corporation in exchange for new securities under the plan. shall be delivered to the Trustee and pledged as collateral security for the new bonds.
- 3. The new bonds shall not bear coupons, but shall be registered both as to principal and interest, and payment of interest and principal shall be made by the new corporation to the Trustee and by the Trustee only to the registered holders.

- 4. The new bonds shall be redeemable on any interest payment date, in whole or in part (selected by lot), at their face amount plus accrued and unpaid interest.
- The new indenture shall provide that there shall be deposited with the Trustee, at least fifteen (15) days before each semiannual interest payment date, (a) such amount, not exceeding 50% of the available net income of the new corporation for the six (6) months period ended three (3) months prior to such interest payment date, as may be necessary to pay current and accumulated interest on and current and accumulated sinking fund payments with respect to the new Series U bonds, and s(b) such amount, not exceeding 50% of the available net income of the new corporation for the same period, as may be necessary to pay current and accumulated interest on, and current and accumulated sinking fund payments with respect to, the new Series C bonds. The amounts referred. to in "(a)" and "(b)" shall be applied by the Trustee to the payment of interest, and to the sinking fund requirements of the new Series U bonds and the new Series & bonds, respectively.
- 6. The term "net income" as used in the plan and in the new indenture is hereby defined to be the result of the following computations:

The gross income of the new corporation shall be computed in accordance with generally accepted accounting practice, and shall include the gross income of the Debtor and its subsidiaries on a consolidated basis from January 1, 1937 to the date of transfer of the properties to the new corporation, but shall exclude (a) moneys received from the sale or exchange of either fee properties or lease-holds and payable to the Trustee as proceeds from fee

properties or leascholds released from the new indenture; (b) insurance and condemnation moneys and other moneys received as compensation for damaged property, and (c) income derived from retirement of new bonds or new preferred stock purchased at a discount.

From the gross income so computed shall be deducted the operating and other expenses computed as follows, and the balance then remaining shall be the "net income" of the new corporation:

(a) Operating expenses

These shall not include (1) any amounts on account of depreciation, depletion, obsolescence or amortization, or (2) unreasonable salaries or other unreasonable charges.

These shall include (1) salaries and wages, including compensation of executive officers and for other managerial services, provided, however, that any salary over \$9,500 per year to any, one executive officer or employee shall be approved by a majority vote of the board of directors, including a majority of the directors elected by the holders of the new. preferred stock: (2) repairs, maintenance, and replacements (except as paid from insurance or condemnation moneys or moneys received as compensation for damaged property); (3) alterations, improvements and additions approved by a majority vote of the board of directors, including a majority of the directors elected by the holders of the new preferred stock: (4) operating supplies, including water and power; (5) rents and royalties; (6) provision for all taxes, licenses, assessments and insurance; (7) selling expenses; (8) provision for doubtful accounts;

- (9) interest, other than interest on the new bonds; (10) adjustments to operating income for expenses for prior periods; (11) legal and accounting expenses and trustee's fees and expenses; (12) any payments referred to in Article XI hereof; and (13) all other usual and necessary operating expenses not included above.
- (b) Such amounts occessary to create and/or maintain adequate working capital as shall be approved by a majority vote of the board of directors, including a majority of the directors elected by the holders of the new preferred stock.
- (c) Reorganization expenses, or payments on notes given for such expenses,
- 7. Net income shall be deemed to be available, as the latter term is used in this plan and to be used in the new indenture, for the various purposes to which it is to be applied unless the board of directors of the new corporation by the vote of at least a majority of its directors, including a majority of the directors elected by holders of the new preferred stock, shall determine by resolution, in their absolute discretion, that such income is not available for any one or more of such purposes, in which case such income shall be applied to such purposes as said board by . a similar vote shall determine. An event of default under the new indenture, as defined in Paragraph 10 of this article, shall not be deemed to have occurred, nor shall an event be deemed to have occurred under Article VIII hereof which would change the voting rights on the new preferred stock, if the net income of the new corporation, would have been sufficient to make the minimum interest and dividend payments on the new bonds and the new

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preferred stock specified in said Paragraph 10 and said Afficle VIII, respectively, had such not income not been applied to other purposes pursuant to this Paragraph 7.

- The new indenture shall provide that the new corporation shall file with the Trustee, on or before the fifteenth day preceding each semiannual interest payment date, schedules and reports sworn to be correct by an officer of the new corporation, showing for the semiannual period ended three months preceding such interest payment date the gross and net income of the corporation and such other information as the Trustee shall require; and that the new corporation shall file with the Trustee on or before the fifteenth day of March of each year similar schedules and reports, certified by public accountants satisfactory to the Trustee, covering the operations for the preceding year ended December 31st. schedules and reports as may be rendered by public accountants as aforesaid shall be determinative in the event of conflict between the same and the schedules and reports to be furnished by the new corporation. The new indenture shall provide that the Trustee and its representatives shall have access to the books and records of the new corporation and to the properties of the new corporation at any time for the purpose of making examination of the same and that the Commissioner of Corporations of the State of California shall have access to the books and records of the Trustee with respect to the new indenture and the trust thereby created. Such books, records, schedules and reports shall be in such form and shall contain such data as may be required by the Trustee.
- 9. The amount (not exceeding 50% of the available net income of the new corporation) paid to the Trustee pursuant to Paragraph 5 hereof for the purpose of servic-

ing the new Series U bonds shall be applied by the Trustee, first, to the payment of current interest on such bonds and then to any unpaid accumulation of interest thereon, and second, to the creation and maintenance, annually or semi-annually, of a sinking fund for the retirement, by purchase or redemption, of \$37,500 principal amount of such bonds per year on a cumulative basis. The amount (not exceeding 50% of the available net income of the new corporation) paid to the Trustee pursuant to Paragraph 5 hereof for the purpose of servicing the new Series C bonds shall be applied by the Trustee, first, to the payment of current interest on such bonds and then to any unpaid accumulation of interest thereon, and second, to the creation and maintenance, annually or semi-annually, of a sinking fund for the retirement, by purchase or redemption, of \$22,500 principal amount of such bonds per year on a cumulative basis. In retiring bonds as aforesaid, the Trustee may purchase the same in the open market at the lowest prices obtainable, not exceeding the redemption price, or may call for tenders; and if unable so to purchase bonds, the Trustee shall then redeem bonds to the extent of the funds available therefor, selecting by lot, in such manner as the Trustee may determine, the bonds so to be redeemed. After the aggregate principal amount of the new Series U bonds outstanding shall be approximately equal to the aggregate principal amount of the new Series C bonds outstanding, there shall be no further distinction between said series with respect to the application of sinking fund moneys available for bond retirement and such moneys shall be applied by the Trustee to the retirement, by purchase or redemption, of \$60,000 principal amount of new bonds per year of either or both . series; if the Trustee shall be unable to purchase new

bonds of either series at less than the redemption price, then 50% of said available money shall be applied to redemption by lot of new Series U bonds and the remaining 50% shall be applied to the redemption by lot of new Series C bonds. The new corporation shall be entitled to surrender to the Trustee for cancellation new bonds purchased out of its net income, instead of making cash deposits on account of sinking fund requirements and shall be entitled to receive credit on such sinking fund requirements to the extent of the principal amount of new bonds so surrendered; and the new corporation shall also be entitled to sell new bonds to the Trustee for cancellation, at prices not exceeding the actual cost thereof to the new corporation, in the same manner and under the same conditions as any other holder of new bonds.

- 10. The new indenture shall provide that, with respect to interest payments on the new bonds, events of default shall be deemed to exist only upon the following conditions:
 - (a) If on April 1, 1939 the interest paid on the then outstanding new bonds of either series shall not have aggregated, during the two preceding years ended on said date, four per cent (4%) of the principal amount of the new bonds of such series outstanding on said date; or
 - (b) If on April 1, 1942 the interest paid on the then outstanding new bonds of either series shall not have aggregated, during the five preceding years ended on said date, sixteen per cent (16%) of the principal amount of the new bonds of such series outstanding on said date; or

(c) If on April 1, 1943, or on April 1 of any year thereafter, the interest paid on the then outstanding new bonds of either series shall not have aggregated, in the year ended on any such date, five per cent (5%) of the principal amount of the new bonds of such series outstanding on any such date.

No right of foreclosure or trustee's sale under the new indenture shall accrue until the expiration of two years after the occurrence of any such event of default and then only if such event of default shall not have been meantime remedied.

- 11. The new indenture shall provide that the net cash proceeds received by the new corporation from the sale or condemnation of its properties or interests therein (whether fee properties or leaseholds, but not including proceeds received as bonuses, rentals or otherwise under oil or gas leases) shall be paid to the Trustee as consideration for the release thereof from the lien of the new indenture and that all such proceeds shall be applied by the Trustee as follows:
 - (a) Until such time as the aggregate principal amount of new Series U bonds outstanding shall be approximately equal to the aggregate principal amount of new Series C bonds outstanding, such proceeds shall be applied to the retirement of outstanding new bonds of either series by purchase on the open market or through calls for tenders, at the best prices obtainable, not exceeding the redemption price; and if the Trustee shall be unable to purchase bonds of either series at less than the redemption price; one-half of such proceeds shall be applied by the Trustee

to the redemption of outstanding new bonds of both series in the ratio which the original aggregate principal amount of the new Series U bonds bears to the original aggregate principal amount of the new Series C bonds; the other half of such proceeds shall be paid to the new corporation and applied to the retirement of new preferred stock of either series, by purchase on the open market or through calls for tenders, at the best prices obtainable not exceeding the redemption price, until such time as the aggregate number of shares of new preferred stock of each series outstanding shall be approximately equal, and thereafter to the redemption of new bonds as aforesaid; any such proceeds remaining unapplied by the new corporation to the retirement of new preferred stock at the end of ninety (90) days because of inability to purchase new preferred stock at less than its redemption price, shall be applied to the redemption of new bonds as aforesaid;

(b) After the aggregate principal amount of the new Series U bonds outstanding shall be approximately equal to the aggregate principal amount of the new Series C bonds outstanding, and until such time as the aggregate number of shares of new preferred stock, Series U, outstanding shall be approximately equal to the number of shares of new preferred stock, Series C, outstanding, such proceeds shall be paid to the new corporation and applied to the purchase of outstanding new preferred stock of either series on the open market or through calls for tenders, at the best prices obtainable, not exceeding the redemption price; and if the new corporation shall be unable to purchase new preferred stock of either series at less

than the redefiption price, such proceeds shall be applied by the new corporation to the redemption of new preferred stock outstanding of both series in the ratio which the original aggregate number of shares of new preferred stock, Series U, bears to the original aggregate number of shares of new preferred stock, Series C;

(c) After the aggregate number of shares of new preferred stock, Series U, outstanding shall be approximately equal to the aggregate number of shares of preferred stock, Series C, such proceeds shall thereafter be applied by the Trustee to the retirement of new bonds then outstanding of either series, by purchase or redemption;

provided, however, that such proceeds shall from time to time be paid to new corporation and applied to such other corporate purposes of the new corporation as may be specifically designated by resolution of its board of directors adopted by the affirmative vote of at least a majority of its directors, including a majority of the directors elected by holders of the new preferred stock, upon the delivery to the Trustee of a copy of any such resolution. duly certified by the secretary of the new corporation. New bonds and preferred stock retired pursuant to this paragraph shall not be credited upon the sinking fund requirements, except that new bonds or preferred stock retired with proceeds from the disposition of properties determined by agreement of the Union Committee, the Consumers Committee and Consolidated, or otherwise, to have belonged to Consolidated prior to the consummation of this plan, shall be credited upon the respective sinking fund requirements.

- 12. The new indenture shall contain adequate provisions permitting the Trustee to subordinate the lien thereof to the lessee's interest under oil or gas leases which may at any time be executed by the new corporation.
- 13. The new indenture shall provide that with the consent of the holders of seventy-five per cent (75%) in principal amount of the new bonds then outstanding:
 - (a) The new indenture may be released and the new bonds satisfied (but only with the written consent of the Commissioner of Corporations of the State of California so long as there is such a commissioner) upon payment or delivery to the Trustee, for the benefit of the holders of all the new bonds then outstanding, of a consideration (which may be money, securities or any other consideration). Such consideration may be less than the principal amount of the new bonds then outstanding.
 - (b) With the consent of the new corporation and the Trustee, any of the terms and provisions of the new indenture or the new bonds may be altered, eliminated or supplemented.
 - (c) The new indenture may be subordinated to a new mortgage or trust deed or other encumbrance for such purposes and in such amount as said percentage of the holders of the new bonds then outstanding shall approve.
- 14. The new bonds and the new indenture shall otherwise be in such form and shall contain such terms, provisions and covenants not inconsistent with the terms hereof, as the reorganization committee (hereinafter constituted) may determine.

ARTICLE VII.

NEW PREFERRED STOCK.

The new preferred stock shall have a par value of \$50.00 per share and shall be entitled to preferred dividends at the rate of 5% per annum, and shall be divided into Series U and Series C, as hereinbefore stated. The dividends on such preferred stock shall be noncumulative; provided, however, that any amount of net income as hereinbefore defined available for payment of such dividends, but not applied to such payment, shall accumulate to the extent so available, and further that on the retirement of all new bonds of Series U or of Series C, the dividends on the corresponding series of preferred stock shall become cumulative from the date of such retirement.

The new preferred stock shall be redeemable at par, plus any dividends accumulated and unpaid. In the event of any voluntary or involuntary dissolution, liquidation or winding up of the new corporation, the holders of the new preferred stock shall be entitled to preferential payments to the extent of the full par value thereof, plus any dividends accumulated and unpaid.

On the retirement of all new bonds of Series U or of Series C, the new preferred stock of the corresponding series shall become entitled to the benefit of a sinking fund for the retirement thereof, to be established by the new corporation out of its available net income (not exceeding an amount equal to 50% thereof less amounts required for payment of dividends upon the preferred stock of that series), sufficient to retire by purchase or redemption 750 shares (in the case of the new preferred stock, Series U) and 455 shares (in the case of the new preferred stock, Series C) oper annum on a cumulative

basis. Sinking fund money shall be applied first to the purchase of such stock at the lowest prices obtainable (not exceeding the redemption price), and thereafter to the . redemption of such stock, the shares to be redeemed to be selected by lot in such manner as the board of dirrectors of the new corporation shall determine. After the aggregate number of shares of new preferred stock, Series U outstanding shall be approximately equal to the aggregate number of shares of new preferred stock, Series C outstanding, there shall be no distinction between said series with respect to the application of moneys available for the retirement thereof, and moneys so available shall be applied to the retirement, by purchase or redemption, of 1,205 hares of new preferred stock of either or both series per annum on a cumulative basis. If shares of either series cannot be purchased at less than the redemption price thereof, then 50% of such moneys shall be applied to the redemption by lot of new preferred stock. Series U and the remaining 50% shall be applied to the rederaption by lot of new preferred stock, Series C. The new corporation shall be entitled to surrender to the sinking fund for cancellation new preferred stock purchased out of its net income instead of making cash deposits on account of sinking fund requirements and shall be entitled to receive credit on such sinking fund requirements to the extent of the number of shares of new preferred stock so surrendered; and the new corporation shall also be entitled to sell preferred stock to the sinking fund for cancellation at prices not exceeding the actual cost thereof to the new corporation, in the same manner and under the same conditions as any other holder of new preferred stock.

Wherever in this plan reference is made to the purchase of the new preferred stock, such reference shall be deemed to include participating certificates issued with respect to such stock; and upon the purchase of participating certificates by the new corporation and their surrender to the depositary and agent under the voting trust agreement under which said certificates were originally issued, such certificates shall be cancelled and the shares of new preferred stock represented thereby shall likewise be surrendered to the new corporation for cancellation.

ARTICLE VIII.

VOTING RIGHTS.

The new corporation shall have nine directors, of whom two shall be elected by the holders of the new preferred stock, Series U, two by the holders of the new preferred stock, Series C, and five by the holders of the new common stock; provided, however, upon the happening of any one of the following events, the holders of the new preferred stock. Series U, shall be entitled to elect three directors, the holders of the new preferred stock, Series C, shall be entitled to elect three directors, and the holders of the new common stock shall be entitled to elect three directors:

- (1) If moneys paid to the trustee for application to interest payments on both the series of new bonds in any one of the first three years of the term thereof shall not have amounted in the aggregate to at least \$45,210;
- (2) If interest paid on either series of the new bonds in any year after the third year of the term thereof shall have amounted to less than 5% per annum;

(3) If dividends paid in any year on either series of the new preferred stock, after all of the new bonds shall have been retired, shall not have amounted to 5% of the par value thereof.

At such time after the occurrence of any one or more of the above mentioned events as all accumulations of interest on outstanding new bonds shall have been paid in full, or, if there are no new bonds then outstanding, all accumulations of dividends on the new preferred stock then outstanding shall have been paid in full, the voting rights on the stock of the new corporation shall revert to their original status, i.e., the holders of the new common stock shall be entitled to elect five out of nine of the directors of the new corporation, and the holders of the new preferred stock Series. U shall be entitled to elect two directors, and the holders of the new preferred stock Series C shall be entitled to elect two directors. Such voting rights shall thereafter be subject to change upon the subsequent occurrence of any one said events, on the basis hereinbefore provided. On the retirement of all the preferred stock of either or both series, then all voting rights of the retired series shall vest in the new common stock.

The affirmative vote of at least a majority of the directors of the new corporation, including a majority of the directors elected by holders of the new preferred stock, shall be required to authorize the sale of any of the properties of the new corporation which are subject to the lien of the new indenture.

The voting power of the new corporation shall be divided between the new preferred stock, Series U, the new preferred stock, Series C, and the new common stock, in accordance with the rights thereof to elect directors.

Of the initial board of directors of the new corporation, two members shall be selected by the Union Committee, two members by the Constiners Committee, and five members by the Debtor.

ARTICLE IX.

, VOTING TRUST AGREEMENTS.

The new preferred stock, Series U, to be issued for the benefit of the holders of Union bonds, and the new preferred stock, Series C, to be issued for the benefit of the holders of Consumers bonds, will be issued to the respective voting trustees under two voting trust agreements, one of which shall be designated the "Series U Voting Trust Agreement" and the other of which shall be designated the "Series C Voting Trust Agreement"; and participating certificates shall be issued by the voting trustees thereunder to the holders of Union bonds and Consumers bonds, representing the new preferred stock of the particular series to which they are entitled. 'Any bondholder , who does not wish his new preferred stock to be held by the voting trustees under the voting trust agreement so provided will be entitled to receive his new preferred stock free of any voting trust agreement if he shall give written notice of his wish to the committee representing bonds of his issue at any time prior to the expiration of thirty (30) days after the confirmation of the plan. The voting trust agreements shall be executed by the voting trustees acting thereunder and by the new corporation. Each voting trust agreement shall endure for a period of twenty-one years unless earlier terminated (a) by a majority of the voting trustees thereunder or (b) by instruments in writing executed (1) by the holders of participating certificates

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representing 50% or more of the new preferred stock held thereunder and (2) by the holders of 50% or more of the aggregate principal amount of the new bonds then outstanding of the corresponding series, or (c) as a result of the submission of the question of termination to the holders of participating certificates as hereinafter provided.

At intervals of three (3) years after the execution of the voting trust agreements, the voting trustees under each voting trust agreement shall request the holders of paricipating certificates to vote on the question as to whether or not their voting trust agreement shall be terminated; and if as the result of any such request votes are received from the holders of participating certificates representing 50% or more of the new preferred stock held by the voting trustees of either voting trust agreement and if the holders of a majority of the participating certificates so voting are in favor of termination, the voting trustees shall terminate that agreement within thirty (30) days thereafter.

The initial voting trustees under the Series U voting trust agreement shall be designated by the Union Committee, and the initial voting trustees under the Series C voting trust agreement shall be designated by the Consumers Committee. Each voting trust agreement will provide that at any time any one of the voting trustees thereunder may be removed by a majority of the voting trustees thereunder, and that at any time one or more of the voting trustees thereunder may be removed by instruments in writing executed (1) by the holders of participating certificates representing 50% or more of the new preferred stock held thereunder and (2) by the holders of 50% or more of the aggregate principal amount of the

new bonds then outstanding of the corresponding series; and also that in the event of the death, resignation, incapacity to act, or removal of any voting trustee or voting trustees, a successor or successors may be appointed by the remaining voting trustees or voting trustee thereunder, but that in the event no such appointment is made within thirty (30) days from and after the death, resignation, incapacity to act, or removal of any voting trustee, a successor may be appointed by instruments in writing executed (1) by the holders of participating certificates representing 50% or more of the new preferred stock held thereunder and (2) by the holders of 50% or more of the aggregate principal amount of the new bonds then outstanding of the corresponding series.

The voting trustees shall be entitled to reasonable compensation for their services, but for their usual and ordinary services the compensation of each voting trustee shall not exceed \$10.00 per meeting. The depositary and agent of the voting trustees under each agreement shall be such Los Angeles bank or trust company as may be designated by the voting trustees, and such depositary and agent shall be entitled to reasonable compensation. The compensation of the voting trustees and of their depositaries and agents, and all other expenses of the voting trustees and of the voting trustees.

The voting trustees shall possess and shall be entitled to exercise all rights and powers of the holders of the new preferred stock held under the respective voting trust agreements; provided, however, that in the event the voting trustees under either agreement shall propose (a) to

sell all or substantially all of the properties of the new corporation or the new preferred stock held thereunder. and/or (b) to lease, transfer, convey, mortgage or encumber all or substantially all of the properties of the new corporation, such proposal shall be first mailed to the holders of the participating certificates issued thereunder. and of the new bonds, if any, then outstanding of the corresponding series; and in the event that within thirty (30) days thereafter written dissents to such proposal shall be filed with the depositary and agent thereunder executed (1) by the holders of participating certificates representing 50% or more of the new preferred stock held thereunder and (2) by the holders of 50% or more of the aggregate principal amount of the new bonds then outstanding of the corresponding series, then in such case the voting trustees under that agreement shall not have the right to consummate the proposal so submitted. voting trustees under either agreement may in their discretion, but shall not be required to, submit in like manner and with like effect any proposal which they shall deem substantially to affect the rights or interests of the new corporation or of the holders of securities issued by it.

The voting trust agreements, or either of them, may be amended by resolution of all of the voting trustees acting thereunder, respectively; but if such amendment will materially or substantially affect the rights of the holders of participating certificates, the voting trustees shall mail notice of such proposed amendment to the holders of the participating certificates issued under the particular agreement and of the new bonds of the corresponding series, if any, then outstanding and such amendment shall not become effective if within thirty (30) days thereafter written dissents to such amendment shall be filed with

the depositary and agent under that agreement executed (1) by the holders of participating certificates representing 50% or more of the new preferred stock held thereunder and (2) by the holders of 50% or more of the aggregate principal amount of the new bonds then outstanding of the corresponding series.

The voting trust agreements shall be in such form and contain such terms, provisions and covenants, respectively, not inconsistent with the terms hereof, as the Union and Consumers committees, respectively, may determine.

ARTICLE X.

CANCELLATION OF UNION BONDS AND CON-SUMERS BONDS HELD BY DEBTOR.

As of the date of the plan the Debtor owns and holds Union bonds in the amount of \$102,500 and Consumers bonds in the amount of \$63,500. Such bonds and their appurtenant coupons will be cancelled by the Debtor and will not be included in the capitalization of the new corporation.

ARTICLE XI.

NEW LOAN.

In connection with and to facilitate the consummation of the reorganization and to provide the new corporation with adequate working capital and funds for the payment of the expenses of the reorganization, the new corporation may borrow such amount or amounts as may be approved by the court, not to exceed \$150,000, on such terms as may be approved by the court, and may secure its obligation to repay any sum so borrowed by mortgaging, deeding in trust, pledging or otherwise hypothecating,

in priority to the new indenture, all or any part of the assets now owned by the Debtor and to be acquired by the new corporation in connection with this plan which are not subject to the lien and operation of the present indentures of Union and Consumers. Interest and principal payments made by the new corporation on any such loan shall be deemed to be operating expenses of the new corporation for the purpose of computing the net income of the new corporation to be paid to the Trustee as hereinbefore in Article VI provided.

ARTICLE XII.

PAYMENT OF CLAIMS, COSTS OF ADMINISTRATION AND ALLOWANCES.

No claims (except those to be assumed by the new corporation as hereinbefore provided, and paid according to their terms) are to be paid in cash in full pursuant to this plan, but all costs of administration and other allowances made by the court shall be paid in cash from funds in the hands of the Debtor, or, after the transfer of the properties to the new corporation, in the hands of the new corporation, except that compensation and reimbursement provided for in subdivision (c), clause (9) of Section 77B may be paid in notes of the new corporation, if those entitled thereto will accept such payment and the court finds such compensation reasonable. The members of the Union Committee and of the Consumers Committee shall be entitled to compensation for their services, and likewise, such other persons as the court finds entitled thereto. The

disbursements, liabilities and expenses of said Committees and such other persons will be paid as a part of the expenses of the reorganization. All amounts to be paid by the Debtor or by the new corporation, and all amounts to be paid to said Committee and their respective counsel and others persons for services or expenses incident to the reorganization, are to be subject to the approval of the judge.

ARTICLE XIII.

METHODS OF BECOMING A PARTY TO THE PLAN.

A. Holders of Union bonds not heretofore deposited under the Union protective agreement:

Holders of Union bonds not heretofore deposited under the Union protective agreement may approve and accept the plan by depositing their bonds with the depositary thereunder, unless the Union Committee shall have directed such depositary not to accept additional deposits at such time, or by filing (if the Union Committee shall so determine) with the Union Committee a written approval and acceptance of this plan, in the form designated by the Union Committee, and by making such deposit or filing such approval and acceptance will authorize the Union Committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to carry the plan into effect.

Holders of Union bonds may approve and accept the plan in the reorganization proceedings by such other method as may be specified by the judge.

B. Holders of certificates of deposit heretofore issued under the Union protective agreement:

All depositors of Union bonds who shall not file notice of dissent to the plan as provided in the Union protective agreement, and within the time therein provided, shall thereby assent to the plan and shall authorize the Union Committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to carry the plan into effect.

The Union Committee has caused or will cause copies of the plan to be filed with its depositary and notice to be given to depositors in the manner provided by the Union protective agreement. The adoption of this plan by said Committee shall constitute an amendment of said protective agreement expressly authorizing said Committee, on behalf of all holders of certificates of deposit heretofor issued who shall not file notice of dissent or withdrawal as provided in said agreement, and within the time therein provided, and on behalf of all holders of certificates of deposit hereafter issued, to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to carry the plan into effect.

C. Holders of Consumers bonds not heretofore deposited under the Consumers protective agreement:

Holders of Consumers bonds not heretofore deposited under the Consumers protective agreement may approve and accept the plan by depositing their bonds with the depositary thereunder, unless the Consumers Committee shall have directed such depositary not to accept additional deposits at such time, or by filing (if the Consumers Committee shall so determine) with the Consumers Committee a written approval and acceptance of this plan, in the form designated by the Consumers Committee, and by making such deposit or filing such approval and acceptance will authorize the Consumers Committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to carry the plan into effect.

Holders of Consumers bonds may approve and accept the plan in the reorganization proceedings by such other method as may be specified by the judge.

D. Holders of certificates of deposit heretofore issued under the Consumers protective agreement:

All depositors of Consumers bonds who shall not file notice of dissent to the plan as provided in the Consumers protective agreement, and within the time therein provided, shall thereby assent to the plan and shall authorize the Consumers committee on their behalf to approve the plan, to accept the plan in writing and file such acceptance in the reorganization proceedings, and to carry the plan into effect.

The Consumers Committee has caused or will cause copies of the plan to be filed with its depositary and notice to be given to depositors in the manner provided by the Consumers protective agreement. The adoption of this plan by said Committee shall constitute an amendment of said protective agreement expressly authorizing said Committee on behalf of all holders of certificates of deposit heretofore issued who hall not file notice of dissent or

withdrawal as provided in said agreement, and within the time therein provided, and on behalf of all holders of certificates of deposit hereafter issued, to approve the plan, to accept the plan in writing, and file such acceptance in the reorganization proceedings, and to carry the plan into effect.

E. Stockholders of the Debtor: Holders of the present preferred and common stock of the Debtor (if their acceptance shall be required) shall accept the plan-in the reorganization proceedings in such manner as shall be specified or approved by the judge.

Upon the confirmation by the court, the plan shall be binding upon the Debtor, Union and Consumers, and upon all holders of Union or Consumers bonds and all other creditors, and upon all stockholders of the Debtor or of Union or of Consumers, including those who have not as well as those who have accepted it.

Holders who tender Union or Consumers bonds for exchange for new securities deliverable under the plan, but fail to tender any appurtenant unpaid interest coupon or coupons maturing on or after March 1, 1934, shall be entitled to receive new bonds only upon indemnifying the new corporation, in such manner as it may require, against any liability in respect of the missing coupon or coupons. Coupons, and the bond to which they appertain, shall be deemed to constitute a single claim, and holders of coupons not attached to bonds shall not be entitled to receive any securities issuable under the plan.

ARTICLE XIV.

MEANS FOR EXECUTION OF PLAN.

Subject to the approval of the judge, the members of Union Committee (not exceeding four in number), members of the Consumers Committee (not exceeding four in number), and the Debtor's duly appointed representatives (not exceeding four in number), shall act together as a reorganization committee for the purpose of carrying the plan into effect, and the members of the Union and Consumers Committees so acting shall have, with respect to depositing bondholders, all the authority, powers and rights vested in said respective committees pursuant to the respective protective agreements, (except to the extent that any such authority, powers or rights may be inconsistent with Section 77B). The plan may be executed by any one or more means authorized or permitted by Section 77B, whether or not such means are. expressly mentioned in the plan. Without limiting the genarality of the foregoing, the plan shall be executed at such time after its confirmation as the judge shall prescribe, and otherwise at such time as shall be specified by . the reorganization committee, by the transfer and conveyance to the new corporation of the Union, Consumers and Consolidated properties, free and clear of all claims of Union, Consumers and the Debtor, and their respective stockholders and creditors, except to the extent that any such claims are to be assumed by the new corporation as hereinbefore expressly provided; the execution by: the new corporation of the new indenture, the issue and

delivery of the new bonds, the new preferred stock, the new common stock, and stock purchase warrants, and the participating certificates and voting trust agreements, as herein provided; the payment in cash of the costs of administration and allowances as provided in Article XII hereof; the execution of such other instruments and the delivery of such other securities and the performance of such other acts as the judge or the reorganization committee, with the approval of the judge, shall deem necessary or proper for the purpose of carrying the plan into Subject to the approval of the judge, the reorganization committee shall have full power and authority to prepare, approve, execute or deliver any or all instruments of whatsoever character in their opinion necessary or proper for the purposes of the plan; and the forms and terms of all certificates or articles of incorporation, bonds, stock certificates, stock purchase warrants and agreements providing for their issue, and all other securities and all other instruments and agreements necessary or proper to carry the plan into effect shall be such as the reorganization committee shall determine. The reorganization committee shall have the authority and power expressly conferred upon it under the provisions of the plan and the Union and Consumers protective agreements and also such incidental powers deemed by it necessary and proper to enable it to carry out the purposes of said plan and said protective agreements.

Changes and modifications in the plan may be made in the manner provided in subdivision (f) of Section 77B.

If any change or modification shall be made in the plan in the manner provided in subdivision (f) of Section 7.7B, which in the opinion of the Union or Consumers Committees materially affects the rights of their respective depositors, then such depositors may be given the right to dissent and withdraw in the manner provided in said protective agreements respectively. Either Committee may, at any time prior to the approval of the plan by two thirds of the bondholders and in its absolute discretion, abandon the plan.

ARTICLE XV.

INDEMNITIES AND AGREEMENTS.

The new corporation shall agree to indemnify the present Union Trustee and the Union Committee and the present Consumers trustee and the Consumers Committee against: (1) all cost and expense caused by or resulting from these proceedings and any reorganization pursuant thereto, in such amounts as have been approved by. the judge; (2) all income and other tax liability arising out of the deposit of the bonds, or resulting from the plan of reorganization or any transaction required or authorized by the plan or by the judge in connection with the plan, and (3) all liability resulting from acts done in good faith and within the scope of their authority in connection with the reorganization proceedings and the submission and consummation of this plan of reorganization: The new corporation shall also enter into any and all agreements with the Debtor, the present Union trustee

or the present Consumers trustee, or any one or more of them, which the judge shall find necessary or proper in connection with the carrying into execution of this plan of reorganization.

The acceptance of any of the new bonds, the new stock purchase warrants, or any other new security, pursuant to the plan, shall estop such acceptor from questioning the conformity of such securities in any particular to any provision of the plan, and shall constitute full ratification by such acceptor of all acts and proceedings of the Union Committee, the present Union trustee, the Consumers Committee, the present Consumers trustees and the new corporation in carrying the plan into effect.

The receipt by the holders of certificates of deposit representing a majority in amount of the present bonds, of new securities under any provisions of the plan, shall constitute a release and discharge of the Committees, the new corporation and the present trustees on the part of all bondholders, from all liability and accountability of every kind, character and description whatsoever save the obligation of the new corporation and the voting trustees to make delivery of a like pro rata amount of securities upon the presentation and surrender of outstanding present bonds with all appurtenant coupons.

This plan is submitted by the Debtor, the Union Committee and the Consumers Committee. In order to evidence its adoption the Union Committee and the Consumers Committee have caused this plan to be executed by at least a majority of their members.

Dated as of March 15, 1937.

CONSOLIDATED ROCK PRODUCTS CO.
By ROBT. MITCHELL

Its Vice President

And J. R. ALLDER

Its Asst. Secretary

(Corporate Seal)

Debtor

UNION ROCK COMPANY BONDHOLDERS'
PROTECTIVE COMMITTEE

By F. B, BADGLEY

(F. B. Badgley)

Colonel R. E. FRITH

(Colonel R. E. Frith)

T. FENTON KNIGHT

(T. Fenton Knight)

WALTER S. TAYLOR

· (Walter S. Taylor)

UNION COMMITTEE

CONSUMERS ROCK AND GRAVEL COMPANY, INC.

BONDHOLDERS' PROTECTIVE COMMITTEE

By WM. D. COURTRIGHT

(Wm. D. Courtright)

FRED L. DREHER

(Fred L. Dreher)

F. J. GAY

(F. J. Gay)

GUY WITTER *

(Guy Witter)

CONSUMERS COMMITTEE

[EXHIBIT B]

- UNION ROCK COMPANY

Bondholders' Committee
T. Fenton Knight, Secy.
629 South Spring Street
Los Angeles, California
Telephone TRinity 6097

Committee

F. B. Badgley, Chairman Colonel R. E. Frith T. Fenton Knight

Walter S. Taylor

O'Melveny, Tuller & Myers

Title Insurance Bldg.

Counsel

1937

To Depositors of Union Rock Company First Mortgage Serial

and Sinking Fund Gold Bonds:

also being presented to the security holders of these two companies for their approval.

The plan provides for the transfer of all of the properties of Consolidated, Consumers and Union to a new corporation which will have a capitalization of bonds, preferred stock of the par value of \$50 per share, and common stock of the par value of \$2 per share. The bonds and preferred stock are to be divided into two series: Series U and Series C. The two series of bonds will be identically secured by a new indenture; and the two series of preferred stock will have the same relative priority as to liquidation preferences. Union bondholders will receive for each \$1000 present Union bond: (a) a new \$500 Series U bond; (b) ten shares of new Series U preferred stock; and (c) warrants entitling the holder to purchase twenty shares of new common stock at any time during a period of five years at prices ranging from \$2 to \$6 per share. Consumers bondholders will receive the same except that their new bonds and preferred stock will be of Series C. Separate voting trusts are provided for the new Series U and Series C preferred stock. Holders of preferred stock of Consolidated will receive one share of new common stock for each share of Consolidated preferred and holders of Consolidated common stock will receive for each 5 shares of Consolidated common a warrant entitling them to purchase the share of new common stock at \$1 per share at any time within 3 months from the date of the warrant.

The long delay in presenting this plan of reorganization to you is largely due to the extended negotiations necessary to reconcile certain differences of opinion between this Committee and the Consumers Bondholders' Commit-

tee and the directors and other representatives of the Consolidated stockholders. These differences of opinion were inherent in the complexity of the situation. Not only are three different corporations involved, each with its own properties, but there are the three groups of security holders, viz., Union bondholders, Consumers bondholders, and Consolidated stockholders, each of which has a particular interest in one of the three properties. The Consumers bondholders have a first mortgage on the Consumers properties; the Union bondholders have a first mortgage on the Union properties; the Consolidated stockholders (through their stock ownership), own the Consolidated properties which are not subject to the lien of either mortgage, and in addition, through Consolidated ownership of the stock of Union and Consumers, have whatever equity there may be in the Union and · Consumers properties Although the interests of these three groups are in some respects divergent, nevertheless all three properties due to their having been operated as a unit for the past seven years, have necessarily become commingled to a degree which would make the process of separation not only difficult, prolonged and expensive, but probably disadvantageous to each of the three groups of security holders for the reason that all three properties can be operated most efficiently and economically as a unit.

The differences in opinion among the three groups have centered around three major points: first, the equitable allocation of net income to the servicing of the two new series of bonds and preferred stock in view of the fact that the major part of the tonnage during the

period of consolidated operation has been produced from the Consumers properties, although the values of the Union and Consumers properties appear to bear substantially the same ratio to each other as the amounts of Union and Consumers bonds outstanding; second, the application to the retirement of the two series of new bonds and preferred stock, of proceeds which may reasonably be expected to be realized in the near future from the liquidation of properties which are not essential to the operations of the business; and third, the equitable division of voting control of the new corporation, in view of the fact that the present bondholders who are to receive new bonds and preferred stock will be retaining a secured position as to half of their investment and a preferred position as to the other half.

These differences in opinion have been reconciled in the enclosed plan as a result of concessions made by each of the three groups for what is believed to be the best interests of all. With respect to the first point, the plan provides that the net income of the new corporation shall be divided into two equal parts, one of which shall be applied primarily to servicing the new Series U bonds and preferred stock, and the other primarily to servicing the new Series C bonds and preferred stock. With respect to the second point, the plan provides that the proceeds from liquidation of nonessential properties (whether originally Consumers, Union or Consolidated properties) shall be applied to the retirement of the new bonds and the preferred stock of either series, at the most ad-

vantageous prices obtainable. The normal effect of this provision should be to equalize within a reasonable period the respective amounts of the new series of bonds and preferred stock, and at the same time provide a market for securities owned by those who wish to liquidate their investment. With respect to the third point, the plan provides that the common stockholders of the new corporationwill be entitled to elect five out of nine directors, and the preferred stockholders will be entitled to elect four directors (two to be elected by the holders of the new Series U preferred stock and two by the holders of the new Series C preferred stock), with the further provision that if the new corporation fails to meet specified minimum payments on the new bonds and preferred stock, the. holders of the new preferred stock will be entitled to elect six of the nine directors, thus affording a means whereby the present bondholders can take over the management of the new corporation under conditions which would warrant such control.

In considering the manner in which these differences of opinion have been compromised in the enclosed plan, the bondholders should not lose sight of the major advantages of the plan, which are that all three properties will be actually consolidated and continue as an operating and that the new bonds are to be secured by a lien upon all three properties. In this connection it should be noted that Consolidated will make a valuable contribution to the new company in working capital, truck equipment, and

goodwill as a going concern. The Consolidated managers estimate that the value of the tangible assets which Consolidated will thus contribute to the new corporation will amount to several hundred thousand dollars.

In spite of the handicaps under which Consolidated has operated since May 24, 1935, when its petition for reorganization was filed, its earnings have shown a material improvement. For the calendar year 1936 the management reports an improvement in net income prior to bond interest and depreciation charges of 150% over the previous year. It is the opinion of this Committee that the acceptance of the enclosed plan of reorganization will be reflected in further improvements in earnings for the current and future years. We believe that this plan of reorganization offers the most satisfactory solution to a very involved problem.

If as we recommend, you desire to approve the plan, no affirmative action by you is necessary as the Committee will accept the plan on your behalf in the reorganization proceeding. Upon consummation of the plan you will be notified to surrender your certificate of deposit for the new securities to which you will be entitled.

If you do not want the Committee to accept the plan on your behalf, but do not want to withdraw your bonds from deposit (which would necessitate your paying your ro rata of the Committee's expenses to date), then you may advise the Committee in writing, within thirty days from date; of your dissent, and if so advised, the Com-

mittee will not accept the plan on your behalf; otherwise the Committee will assume that you approve the plan and are willing to have the Committee accept it for you.

If you wish to withdraw your bonds from deposit, you may do so by filing written notice of your intention with Title Insurance and Trust Company (Corporate Trust Department), as Depositary, 433 South Spring Street, Los Angeles, California, within thirty days from the date of this letter and by paying your pro rata of the expenses of the Committee incurred to the date of your withdrawal, as to the amount of which the Depositary will advise you upon request, and by surrendering your certificate of deposit, all as more specifically provided in Article III of the Union Rock Company Bondholders' Protective Agreement.

For your convenience, we are appending a summary of the plan, but, since any summary necessarily omits many details, we request you to read the enclosed copy of the plan in its entirety, and commend it to your favorable consideration.

Yours very truly,

UNION ROCK COMPANY

BONDHOLDERS' PROTECTIVE COMMITTEE

By F. B. BADGLEY,
COL. R. E. FRITH,
T. FENTON KNIGHT, and
WALTER S. TAYLOR.

As Members.

[For summary attached hereto, see next Exhibit.]

[Letter from Union Bondholders' Committee omitted.]

SUMMARY OF PLAN OF REORGANIZATION* TRANSFER OF ASSETS AND CAPITALIZATION OF NEW CORPORATION

A new corporation will be formed, to which all of the assets of Consolidated Rock Products Co., Consumers Rock & Gravel Company, Inc., and Union Rock Company will be transferred. This new corporation will have the following capitalization:

- (1) \$1,507,000 principal amount of new cumulative income 5% bonds. The new bonds will be divided into Series U and Series C, comprising principal amounts of \$938,500 and \$568,500 respectively;
- (2) 30,140 shares of 5% preferred stock of the par value of \$50.00 per share. The preferred stock will be divided into Series U and Series C, comprising 18,770 and 11,370 shares respectively;
- (3) 425,718 shares of common stock of the par value of \$2 per share of which
 - (a) 285,947 shares will be issued to the present preferred stockholders of the Debtor;
 - (b) 37,540 shares will be reserved for issuance upon the exercise of stock purchase warrants to be attached to the new preferred stock, Series U;
 - (c) 22,740 shares will be reserved for issuance upon exercise of stock purchase warrants to be attached to the new preferred stock, Series C;

(d) 79,491 shares will be reserved for issuance upon exercise of stock purchase warrants to be issued to the holders of the present common stock of the Debtor.

TREATMENT OF EXISTING SECURITY HOLDERS

- 1. For each present \$1000 bond, holders of Union and Consumers bonds will receive the following securities (new Series U bonds and preferred stock being allocated to Union bonds and new Series C bonds and preferred stock being allocated to Consumers bonds):
 - (a) \$500 principal amount of new bonds;
 - (b) 10 shares of new preferred stock (par value, \$50 per share);
 - (c) Warrants for the purchase of 20 shares of new common stock at any time within five (5) years, at prices ranging from \$2 during the first six months to \$6 in the fifth year.
- 2. Holders of present preferred stock of Consolidated Rock Products Co. will receive one share of new common stock for each share of such preferred stock held by them.
- 3. Holders of present common stock of Consolidated Rock Products Co. will receive, for each five shares of such stock held by them, a warrant for the purchase within three months of one share of new common stock at the price of \$1 per share.

ALLOCATION OF NET INCOME

The available net income of the new corporation, as defined in the plan, shall be divided into two equal parts. Such parts shall be applied separately to servicing the bonds and preferred stock of Series U and Series C,

respectively, according to the following schedule of pri-

- (a) Payment of 5% cumulative interest on the bonds;
- (b) Maintenance of a 4% cumulative sinking fund for retirement of bonds;

*This summary is submitted for the convenience of the readers and is necessarily incomplete. Reference is made to the enclosed copy of the full Plan for details.

- (c) Payment of 5% dividends on the preferred stock;
- (d) Maintenance of a 4% cumulative sinking fund for preferred stock (commencing after retirement of bonds);
- (e) Any moneys remaining to be available for general corporate purposes, subject to certain limitations specified in the plan.

The corporation shall not pay dividends on the common stock without applying an equal amount to the retirement of preferred stock in addition to the sinking fund requirements with respect to such preferred stock.

PROVISIONS OF NEW BONDS AND TRUST INDENTURE

- 1. The bonds shall be dated as of April 1, 1937 and expressed to mature on April 1, 1957, and shall bear interest at the rate of 5% per annum, payable April 1 and October 1, but only out of available net income. Such interest shall be cumulative. The bonds may be called for redemption at par and accrued interest.
 - 2. The bonds shall be secured by a trust deed and chattel mortgage on all the property to be acquired by the new corporation. (See 3 under miscellaneous.)

- 3. The bonds shall not bear coupons but shall be registered as to both principal and interest.
 - 4. "Net income" and "available net income" shall be defined in the new indenture as defined in the plan.
- 5. The available net income after payment of interest is to be applied to the creation and maintenance of cumulative sinking funds for the retirement of \$37,500 principal amount of Series U bonds and \$22,500 principal amount of Series C bonds per year. Failure to meet annual sinking fund requirements shall not be an act of default.
- 6. With respect to interest payments on the bonds, events of default shall be deemed to exist only upon the following conditions:
 - (a) If at the end of the second year of the term of the new bonds, interest paid on either series shall not have aggregated 4% of the principal amount of the new bonds then outstanding;
 - (b) If at the end of the fifth year of the term of new bonds interest paid on either series shall not have aggregated 16% of the principal amount of new bonds then outstanding;
 - (c) If during the sixth year of the term of the new bonds and during—each year thereafter interest paid on the new bonds shall not have aggregated 5% per annum of the principal amount of the new bonds then outstanding.

In the event of default in interest payments, there is a provision for a period of 24 months of grace before foreclosure proceedings may be instituted.

DISPOSITION OF PROCEEDS OF SALE OF ASSETS

- be used to purchase bonds of either series for retirement at the lowest price obtainable. If no bonds can be obtained at less than par, one-half of such moneys shall be applied to purchase preferred stock of either series at the lowest price obtainable, and the other half shall be used to call bonds of Series U and Series C in the ratio of the original principal amounts of the two series.
- 2. After the principal amounts of the two series of bonds shall be approximately equal, funds received from liquidation of assets shall be applied in the same manner as above to the retirement of the preferred stock of Series U and Series C.
- 3. After both the bonds of the preferred stock of the two series are approximately equal, proceeds from the liquidation of assets shall be applied to the retirement of new bonds of either series by purchase of redemption.

PREFERRED STOCK

- 1. Dividends on preferred stock of Series U and Series C shall be noncumulative until such time as bonds of the corresponding series have been fully retired and shall then become cumulative. The preferred stock of both series shall be redeemable at par plus accumulated dividends.
- 2. On the retirement of all the bonds of either Series U or Series C, the preferred stock of the corresponding series shall become entitled to the benefits of a cumulative earnings sinking fund sufficient to retire annually approximately 4% of the preferred stock of that series originally issued.

VOTING RIGHTS

- 1. The board of directors shall have nine members, of whom five shall be elected by the holders of the common stock, two by holders of the preferred stock, Series U, and two by the holders of the preferred stock, Series C.
- 2. On the occurrence of any of the following events, the holders of the preferred stock shall have the right to elect six of the nine directors (three to be elected by Series U, three by Series C and three by the common):
 - (a) If, during any one of the first three years of the term of the bonds, at least \$45,210 has not been applied to interest payments;
 - (b) If interest paid on either series of the new bonds in any one year after the third year shall have amounted to less than 5%;
 - (c) If, after all the bonds have been retired, dividends on either series of preferred stock shall not have.

 amounted to 5% in any one year.
- 3. The voting rights shall be restored to their original status upon the subsequent fulfillment of any of the above deficiencies.
- 4. The concurrence of at least a majority of the directors elected by the holders of the preferred stock shall be required in any of the following matters:
 - (a) The authorization of the sale of assets subject to the indenture;
 - (b) The determination of amounts necessary to maintain adequates working capital;
 - (c) Any determination that net income is not available for bond interest or retirement, or preferred stock dividends or retirement, and as to any other purpose to which such net income shall be applied.
 - (d) The approval of any salary in excess of \$9,500 per annum.

MISCELLANEOUS

- 1. Separate voting trusts shall be established for the preferred stock of Series U and Series C and participating certificates thereunder shall be issued to evidence the ownership of such preferred stock. The preferred stock will be placed in a voting trust only if the bondholder entitled thereto fails to indicate his contrary preference prior to the thirtieth day after confirmation of the plan.
- 2. Union bonds in the amount of \$102,500 and Consumers bonds in the amount of \$63,500, now owned by Consolidated Rock Products Co. shall be canceled.
- 3. On such/terms as may be approved by the court, the new corporation may borrow not exceeding \$150,000, if necessary for working capital and payment of reorganization expense, and may secure such loan with a mortgage or trust deed covering the properties now owned by Consolidated Rock Products Co., superior to the lien of the new indenture.
- 4. To become effective the plan must be approved by the holders of two-thirds of the Union bonds, two-thirds of the Consumers bon's and a majority of each class of stock of the three corporations involved, and confirmed by the court, but if the court shall determine that Consolidated, Union or Consumers is insolvent or that any class of stockholders will not be materially and adversely affected by the plan, then the plan may be confirmed without the consent of the stockers of Consolidated or Union or Consumers, or any class thereof not so affected, as the case may be.

EXHIBIT G.1

Committee:

W. D. Courtright Fred L. Dreher F. J. Gay Alfred Ginoux Guy Witter Secretary:
Harry R. Wiley,
634 So. Spring St.,
Los Angeles

Counsel:

Gibson, Dunn & Crutcher, Los Angeles

Bondholders' Protective Committee

CONSUMERS' ROCK & GRAVEL COMPANY, INC.

First Mortgage Sinking Fund Gold Bonds

April , 1937.

To Holders of Deposit Receipts:

Under date of September 21, 1936, this Committee wrote you to the effect that it had, on June 1, 1936, filed a petition in intervention in the 77B bankruptcy proceedings involving Consolidated Rock Products Co., Union Rock Company, and Consumers Rock and Gravel Company, Inc., which petition proposed a plan of reorganization involving only the assets of Consumers Rock and Gravel Company, Inc. A copy of such petition, in which was included a copy of said separate Consumers plan of reorganization dated June 1, 1936, was enclosed with that letter.

We stated to you in said letter that we had at that time been unable to accept or to recommend to you any plan of reorganization up to then proposed by the Consolidated or Union interests and involving the continued operation of all of the properties as one finit, for the reason that no such plan had up to then been proposed which provided for a division of future revenues as between the Consolidated, Union and Consumers interests on a basis which we believed to be commensurate with the comparative earning, powers of the three sets of properties. Because we believed at that time that no agreement between the other interests could be reached, we then adopted and recommended to you the plan as set forth in the petition in intervention, which plan involved a complete separation of the Consumers properties from the Consolidated and Union properties.

Shortly after the submission to you of the separate Consumers plan dated June 1, 1936, a new series of conferences was begun between representatives of this Committee and its counsel and representatives of the Union and Consolidated interests, with the intent that one more final attempt should be made to agree upon a plan for all these companies. These negotiations have continued almost constantly during the last six months, and we are now happy to report to you that they have resulted in a plan which not only involves the complete consolidation of all three properties, but which also embodies what we consider to be an allocation of the future net income of such consolidated properties on a basis fair to the Consumers bondholders.

Reducing the formula of the proposed plan to its simplest terms, it has been agreed between the various representatives that a reorganization will be effected by transferring all of the properties (including the Consolidated properties not subject to either the Union or the Consumers indenture) to a new corporation and that the net

income of the new corporation shall be divided into two equal parts, one of which parts will be used for the service of the securities of the proposed new company to be issued to Consumers bondholders, and the other of which will be used for the service of the securities of the proposed new company to be issued to Union bondholders, any balance remaining to be applied to the general corporate purposes of the new company. The Consumers bonds represent approximately 38% and the Union bonds approximately 62% of the combined bonded indebtedness.

Your Committee believes that the plan now proposed successfully overcomes the objections which your Committee had raised to all prior plans submitted by the Consolidated and Union interests, and that therefore the necessity which prompted our submission to you of the June 1, 1936, plan of reorganization (involving the separation of the Consumers properties) has been removed.

We have, therefore, abandoned the plan dated June 1, 1936, and have adopted the Plan of Reorganization dated March 15, 1937, involving all three properties, a copy of which Plan of Reorganization dated March 15, 1937, is enclosed herewith, and is submitted for your consideration. This Plan of Reorganization, dated March 15, 1937, has also been adopted by the Union Rock Company Bondholders' Protective Committee and by the Board of Directors of Consolidated Rock Products Co. and is at this time also being presented to the security holders of those two companies for their consideration.

Inc., Bondholders' Protective Agreement dated June 1, 1935.

The Plan of Reorganization now proposed provides that the new corporation shall have a capitalization of bonds, preferred stock of the par value of \$50 per share, and common stock of the par value of \$2 per share. The bonds and preferred stock are to be divided into two series: Series U and Series C. The two series of bonds will be identically secured by a new indenture to cover all of the properties of the new corporation, and the two series of preferred stock will have the same relative priority as to liquidation preferences. Consumers bondholders will receive for each \$1000 present Consumers bond: (a) a new \$500 Series C bond; (b) ten shares of new Series C preferred stock; and (c) warrants entitling the holder to purchase twenty shares of new common stock at any time during a period of five years at prices ranging from \$2 to \$6 per share. Union bondholders will receive the same except that their new bonds and preferred stock will be of Series U. Holders of preferred stock of Consolidated will receive one share of new common stock for each share of Consolidated preferred and holders of Consolidated common stock will receive for each 5 shares of Consolidated common a warrant entitling them to purchase one share of new common stock at \$1 per share at any time within 3 months from the date of the warrant.

We request that you bear in mind that the long delay in presenting this Plan of Reorganization to you is largely due to the extended negotiations which have been necessary in order to reconcile certain differences of opinion between this Committee and the Union Bondholders' Committee and the Directors and other representatives of the

Consolidated stockholders. These differences of opinion were inherent in the complexity of the interests. Not only were three different corporations involved, each with its own properties, but there are three groups of security holders, viz., Consumers bondholders, Union bondholders, and Consolidated stockholders, each of which has particular interests in one of the three sets of properties. Although the interests of these three groups are in some respects divergent, neverticless all three properties, due to their having been operated as a unit for the past seven years, have necessarily become commingled to a degree which would have made the process of separation not only prolonged and expensive but to some extent disadvantageous to each of the three groups of security holders. Your Committee insisted upon such a separation only until an agreement fair to Consumers bondholders could be reached as to future allocation of net income.

The differences in opinion among the three groups have centered around three major points: first and already mentioned, the equitable allocation of net income to the servicing of the two new series of bonds and preferred stock in view of the fact that the major part of the tonnage during the past two years has been produced from the Consumers properties; second, the application to the retirement of the two series of new bonds and preferred stock, of proceeds which may reasonably be expected to be realized in the near future from the liquidation of properties which are not essential to the operations of the business; and third, the equitable division of voting control of the new corporation, in view of the fact that the present bondholders who are to receive new bonds and preferred stock will be retaining a secured position as to

half of their investment and a preferred position as to the other half.

These differences in opinion have been reconciled in the enclosed Plan of Reorganization as a result of concessions made by each of the three groups for what is believed to be the best interests of all. With respect to the first point, the Plan provides, as already stated, that the net income of the new corporation shall be divided into two? equal parts, one of which shall be applied to servicing the new Series C bonds and preferred stock, and the other to servicing the new Series U bonds and preferred stock. With respect to the second point, the Plan provides that the proceeds from liquidation of nonessential properties (whether originally Consumers, Union or Consolidated properties) shall be applied to the retirement of the new bonds and the preferred stock of either series, at the most advantageous prices obtainable. Your Committee was. willing to accept this provision for the reason that in all probability the Union properties will, in general, be the first to be liquidated. This provision should tend to equalize within a reasonable period the respective amounts of the new series of bonds and preferred stock, and at the same time will provide a market for those who wish to liquidate their investment. With respect to the third point, the Plan provides that the common stockholders of the new corporation will be entitled to elect five out of nine directors, and the preferred stockholders will be entitled to elect Your directors (two to be elected by the holders of the new Series C preferred stock and two by

the holders of the new Series U preferred stock), with the further provision that the new corporation may not sell any of the properties to be subject to the new inderecture or apply net earnings to capital improvements or additions without the affirmative vote of a majority of the directors to be elected by the preferred stockholders. If the new corporation fails to meet specified minimum payments on the new bonds and preferred stock, the holders of the new preferred stock will be entitled to elect six of the nine directors, thus affording a means whereby the present bondholders can take over the management of the new corporation under conditions which would warrant such control.

In considering the manner in which these differences of opinion have been compromised in the enclosed Plan, the bondholders should not lose sight of the major advantages of this Plan over the so-called separate Consumers plan. These are: first, that the separation plan, while it would have preserved all of the earnings of the Consumers properties for the Consumers bondholders, nevertheless would have involved long and costly legal proceedings, the probable necessity of subordinating the lien of the bondholders to a new loan for working capital, competition in the business from the present Consolidated and Union interests, and the difficulties attendant upon obtaining an efficient management; second, what we believe is a fair allocation of future net earnings of the combined properties has now been obtained for the Consumers bondholders; and, third, that all three properties will be actually

consolidated and continue as an operating unit and that the new bonds are to be secured by a lien upon all three properties. In this connection it should be noted that Consolidated will make a valuable contribution to the new company in working capital, truck equipment, and goodwill as a going concern. The Consolidated managers estimate that the value of the tangible assets which Consolidated will thus contribute to the new corporation will amount to several hundred thousand dollars.

In spite of the handicaps under which Consolidated has operated since May 24, 1935, when its petition for reorganization under Section 77B was filed, its earnings have shown a material improvement. For the calendar year 1936 the management reports an improvement in net income prior to bond interest and depreciation charges, of 150% over the previous year. It is the opinion of this Committee that the acceptance of the enclosed Plan of Reorganization will result in further improvements in earnings for the current and future years. We believe that this Plan of Reorganization offers the most satisfactory solution to a very involved problem.

If as we recommend, you are willing that the so-called separate Consumers' Plan, dated June 1, 1936, be abandoned and that the Plan of Reorganization, dated March 15, 1937, and hereby submitted be approved, you need take no affirmative action and the Committee will accept the enclosed Plan on your behalf in the peorganization proceeding. Upon consummation of the enclosed Plan

you will be notified to surrender your deposit receipt for the new securities to which you will be entitled.

If you do not want the Committee to accept the Plan on your behalf, but do not want to withdraw your bonds from deposit (which would necessitate your paying your pro rata of the Committee's expenses to date), then you may advise the Committee in writing, within thirty days from the date of this letter, of your dissent, and if so advised, the Committee will not accept the Plan on your behalf; otherwise the Committee will assume that you approve the Plan and are willing to have the Committee accept it for you, and the Committee will, pursuant to the authority granted to it in the Bondholders' Protective Agreement, file on your behalf with the Federal Court your written consent to and acceptance of the enclosed Plan.

If you wish to withdraw your bonds from deposit, you may do so by filing written notice of your intention with Bank of America National Trust and Savings Association (Corporate Trust Department), as Depositary, 660 South Spring Street, Los Angeles, California, within thirty days from the date of this letter and by paying your pro rata of the expenses of the Committee incurred to the date of your withdrawal, as to the amount of which the Depositary will advise you upon request, and by surrendering your deposit receipt, all as more specifically provided in Article IV of the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Agreement dated June 1, 1935.

Seventy per cent of all of the Consumers bonds outstanding are now on deposit with this Committee, and the Committee is at this time also addressing the holders of undeposited bonds recommending that they be deposited subject to the enclosed Plan.

In the event that the requisite percentage of all Consumers bondholders shall so accept the Plan and if such Plan is finally confirmed by the Court, your bonds now on deposit, together with all of the other deposited bonds, will be dealt with as provided by the Plan. Section 77B of the Bankruptcy Act provides that a plan of reorganization so adopted and confirmed shall be binding upon all creditors affected, whether or not they shall have accepted the same.

For your convenience, we are appending a summary of the enclosed Plan, but, since any summary necessarily omits many details, we request that you read the enclosed copy of the Plan in its entirety, and we commend it to your favorable consideration.

Yours very truly,

CONSUMERS ROCK AND GRAVEL COMPANY INC. BONDHOLDERS' PROTECTIVE COMMITTEE

By Wm. D. Courtright Fred L. Dreher F. J. Gay Guy Witter

As a majority of the members thereof.

[For summary see preceding Exhibit C.]

[EXHIBIT L.]

CONSOLIDATED ROCK PRODUCTS CO.

General Offices
2730 South Alameda Street
Los Angeles, Calif.

Telephone

Counsel:

Adams 3111

Latham, Watkins & Bouchard

To the Stockholders of CONSOLIDATED ROCK PRODUCTS CO.:

Your Board of Directors is glad to be able to advise you that a Plan of Reorganization which preserves the stockholders' equity and reduces annual fixed charges, has been worked out after many conferences with the Protective Committees representing bondholders of Union Rock Company and Consumers Rock & Gravel Company, Inc. We submit herewith a copy of that Plan, together with a brief summary thereof, forms for acceptance and a letter of transmittal.

This Plan was filed with the United States District Cour, on April, 1937. It contemplates the formation of a new company to be known as the Consolidated Rock Company, which will have the following capitalization:

\$1,507,000 5% First Mortgage Bonds

30,140 shares of 5% Preferred Stock

425,718 shares of \$2.00 par value Common Stock.

The holders of Union Rock Company and Consumers Rock & Gravel Company, Inc. bonds will receive a \$500.00 bond and ten shares of preferred stock for each \$1,000.00

principal amount of the bonds they now hold. To each share of this preferred stock will be attached warrants entitling the holder to purchase, at any time within five years after their date, two shares of the new common stock at prices advancing from \$2.00 per share during the first six months of said period to \$6.00 per share in the fifth year.

The Preferred Stockholders of Consolidated Rock Products Co. will receive one share of the new Common Stock for each share of Preferred Stock they now hold, without payment of any kind.

The Common Stockholders will receive warrants entitling them to purchase within three months after their date, one share of new Common stock at a price of \$1.00, for each five shares of the Common Stock they now hold.

We urge you to read the Plan carefully and direct your attention to the following salient features:

- (1) Bondholders are cancelling approximately \$650,-000,00 of delinquent interest.
- (2) The interest rate on the present bonds is 6% and on a fixed basis. The interest rate on the new bonds will be 5% and on a cumulative earnings basis.
- (3) Maximum fixed charges are reduced \$105,490.00 per year and even considering the dividend require nents on the new preferred stock as fixed charges, they are still reduced \$30,140.00 per year.
- (4) The present bonds are being converted into half bonds and half preferred stock and the equity remains in the stockholders.

- (5) The new corporation will not be in default under the new bond indenture so long as \$30,000.00 interest is paid bondholders in each of the first two years and \$60,000.00 in each of the following three years.
- (6) There is no default for failure to meet sinking fund payments.
- (7) Sinking fund requirements can be met by the Company in bonds or preferred stock at par, regardless of their cost to the Company.
- (8) Unnecessary properties may be disposed of and the proceeds used to purchase bonds and then preferred stock for cancellation.
- (9) All of the assets of the main subsidiaries will be in the new corporation and those subsidiaries will be dissolved.
- (10) Control of the new corporation is left in the hands of the new common tockholders so long as the Company is able to meet certain minimum requirements.

Before the Plan can be confirmed by the Court, it will be necessary to obtain the written acceptance thereof by the bondholders and stockholders as provided in the Plan and as set forth in the summary thereof. The respective Bondholder's Committees are endeavoring to obtain the necessary acceptance of the Plan from their bondholders as quickly as possible. If you approve of the Plan, kindly fill in and execute the enclosed acceptance and letter of transmittal and send them, with your stock certificates

endorsed in blank, to the Citizens National Trust & Savings Bank. The self-addressed envelope is enclosed for your convenience. The bank is acting as Escrow Agent in connection with the exchange of stock in reorganization.

As soon as the necessary acceptances of the Plan by both bondholders and stockholders are obtained, the Plan should be confirmed by the Court and the reorganization promptly effected. When it is, your new stock will be sent to you by the Citizens Bank.

If any part of the Plan is not clear to you, or if there is any information which you desire, kindly write or telephone Mr. Robert Mitchell, Secretary of the Company, at the main office of the Company in Los Angeles. If you have any objections to the Plan, you will be given an opportunity to be heard on those objections at a hearing which will be conducted pursuant to an order of the Court and held prior to the confirmation of the Plan. A notice of the time and place of holding that hearing will be sent to you.

Stockholders who have not had experience with reorganization plans may find it difficult to realize the time and effort which have been spent and the delays and disappointments which have been encountered by the management and the Board of Directors in obtaining a plan which would keep Consolidated intact. At times the task seemed almost hopeless, but through unfailing patience and with constructive effort on the part of all concerned the goal has been achieved. While the Plan as worked out appears to be quite complicated, in principal it is quite simple. It was necessary to include many provisions to satisfy both Bondholders' Committees and these provisions tend to give the impression of complexity.

Copies of the Plan have been given to the Consolidated Rock Company stockholders committee of which Mr. Horace G. Miller is chairman.

Your Board of Directors feels that the Plan is practical, preserves the stockholders' equity, and gives them an opportunity to realize on their investment in the Company. Its acceptance is recommended. There will be no expense on your part in connection with the reoganization.

Very respectfully yours,

ROBT. MITCHELL, Secretary By order of the Board of Directors.

[Endorsed]: Filed R. S. Zimmerman Clerk at 10 min. past 10 o'clock, Apr. 28, 1937 A. M. By M. J. Sommer, Deputy Clerk;

TITLE OF DISTRICT COURT AND CAUSE.

Objections to Plan of Reorganization Submitted By Consolidated Rock Products Co., Union Rock Company Bondholders' Committee, and Consumers Rock & Gravel Company, Inc., Bondholders' Committee, dated March 15, 1937, and filed herein April .8, 1937.

To the Honorable Judges of the United States District Court, for the Southern District of California, Central Division:

Comes now E. Blois duBois, hereinafter referred to as "objector", and by way of objection to the plan of reorganization of the above-named companies submitted by Consolidated Rock Products Co., Union Rock Company Bondholders' Committee, and Consumers Rock & Gravel Company, Inc., Bondholders' Committee, dated March 15, 1937, and filed in these proceedings April 28, 1937, respectfully represents to the Court as follows:

I.

For convenience Consolidated Rock Products Co. will hereinafter be referred to as "Consolidated", Consumers Rock & Gravel Company, Inc. as "Consumers", and Union Rock Company as "Union".

H.

That objector is the owner and holder of Union Rock Company First Mortgage Serial and Sinking Fund Gold Bonds, dated as of September 1, 1927, in the principal amount of \$150,000, and of Consumers Rock & Gravel

Company, Inc. First Mortgage Sinking Fund Gold Bonds dated as of July 1, 1928, in the principal amount of \$31,000. As the owner and holder of the aforesaid bonds, objector is a party in interest in these proceedings.

III.

Objection No. I:

Objection is first made to the inclusion in the plan of reorganization of Consolidated, its assets or stockholders, the stockholders of Union and Consumers, or any of them, and in this connection objector alleges that he is informed and believes, and upon such information and belief alleges. that Consumers and Union, debtors herein, are, and each of them is, insolvent within the meaning of the Bankruptcy Act of 1898, as amended and supplemented, and of Section 77(b) thereof, that the aggregate of the property of Consumers and/of Union, exclusive of any property which they or either of them may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay their, or either of their creditors, is not and will not at a fair valuation be sufficient in amount to pay the debts of Consumers, in the one case, and of Union in the other case; that therefore the stockholders of Consumers and the stockholders of Union (being Consolidated Rock Products Company, as the owner and holder of all of the outstanding capital stock of each of said companies), have no interest or equity whatever in the property and assets of either of said companies.

Objector is further informed and believes, and upon such information and belief alleges, that the true value of the assets of each of said companies is not truly reflected in the financial statements which have been filed in these proceedings, and that an independent appraisal of the assets of said companies will disclose that the value thereof is in each case in an amount less than the principal and accrued interest of the outstanding bonds.

For the reasons above set out, the inclusion of Consolidated, the sole owner and holder of stock of Union and Consumers, in any plan of reorganization involving said companies is inequitable and unfair to objector and other holders of bonds of said companies.

·IV

Objection No. II:

The proposed plan is confiscatory as to the holders of either Union or Consumers' bonds in that:

- 1. It contemplates that they shall be compelled to accept new bonds equal in principal amount to only one-half of their present holdings.
- 2. No provision whatever is made to discharge or otherwise recognize accrued and unpaid interest on outstanding bonds.
- 3. The proposed issue to the bondholders of preferred stock, with common stock purchase warrants attached, will not fairly compensate the present bondholders on account of the bond principal, plus accrued interest, which they will be compelled to lose.
- 4. The plan contemplates that unsecured creditors of Consolidated, Union and Consumers shall not be affected by the plan of reorganization, and in effect grants such unsecured creditors a preferred position over the present bondholders of Consumers and Union.

- 5. By the provisions of Paragraph 13, Article VI of? the plan, the rights of minority bondholders may be further prejudiced and ignored through amendment of the proposed new indenture or release of the same in a manner or for a consideration approved by 75 per cent in principal amount of the new bonds.
- 6. The common stock of the proposed new company is offered to the present bondholders at a price which in effect prefers the present stockholders of Consolidated over said bondholders.

V

Objection No. III:0

The proposed plan is misleading and unfair and inequitable as to the present bondholders of Union and Consumers in that:

- 1. While it is first made to appear that all net income of the new company will be set aside to service and/or redeem the new bonds and new preferred stock the plan permits use of net income for general corporate purposes prior to redemption of the proposed new bonds and new preferred stock.
- 2. The plan contemplates that the present bondholders of Union and Consumers may be placed in the position of junior lien holders of the new corporation through the execution, pursuant to Article XI of the plan, of a prior encumbrance; and the provisions of Article VI of the proposed plan permit the Union Bondholders' Committee and the Consumers Bondholders' Committee, acting jointly, to authorize liens prior to that which is offered the present bondholders.

- 3. The definition of "net income" as used in the proposed plan is unfair and inequitable in that it permits deduction from gross income of the expense of alterations, improvements and additions prior to any application of income to servicing of the proposed new bonds and preferred stock, and likewise permits the directors of the proposed new corporation in their sole discretion to deduct such further amount from gross income as they may deem necessary to create and maintain adequate working capital. Said definition deprives the proposed new bonds of all certainty of income and favors those who may become common stockholders of the new company over those who are now its first lien holders.
- 4. Paragraph 7 of Article VI of the proposed plan leaves to the entire discretion of the board of directors of the new company the determination of what shall constitute "available net income" for application to the new bonds and preferred stock, and renders the income which may be anticipated by the existing bondholders indefinite and uncertain, and likewise from a practical standpoint, leaves to the board of directors the power to determine that no event of default under the indentures securing the bonds actually exists at any time.

VI.

Objection No. IV:

The proposed plan of reorganization is further unfair and inequitable in that:

1. The provisions of Paragraph 10 of Article VI of proposed plan with respect to events of default under the proposed new indenture are unconscionable in that;

- a. Excessive periods of nonpayment of interest are permitted during which the remedy of foreclosure is denied to the bondholders.
- b. Excessively low rates of interest are permitted without remedy to the bondholders.
- c. The two-year period of grace, as to any default which may occur indefinitely postpones any remedy to the bondholders.
- 2. Paragraph 11, Article VI of the plan permits the proceeds received from sale or condemnation of property securing the proposed new bonds to be diverted to purposes other than the redemption of said bonds.
- 3. The proposed voting trust agreements of Article IX of the plan insure control of the proposed new corporation in the hands of a management which in large measure is responsible for the present condition of the debtor companies.
- 4. While Article X of the proposed plan provides for cancellation of the existing bonds of Union and Consumers held by Consolidated, no provision is made under which Consolidated shall contribute to the new company any excess indebtedness over and above the principal amount of said bonds, plus accrued interest, owing by it to Union and Consumers. In this connection objector is informed and believes and upon such information and belief alleges that Consolidated is indebted to Union and Consumers in an amount far in excess of the amount of the bonds of said companies now held by Consolidated and which are proposed to be cancelled in the plan of reorganization, and the extent of this indebtedness can only be determined by a fair and impartial audit of the books of the three debtor corporations.

- 5. Paragraph 11, Article VI of the plan by implication will permit the corporation purchase the new bonds in the open market with income which should be applied to discharge of the existing bonded indebtedness.
- 6. A proposed division of income of the new company in equal proportions between the bondholders of Union and Consumers is unfair and disproportionate to the ratio of the existing bonded indebtedness of the company.

VII.

Objector is informed and believes, and upon such information and belief alleges, that on or about March 6, 1929, being a date subsequent to the issuance and sale of Consumers' bonds, Consolidated, one of the debtors herein, acquired all of the outstanding capital stock of Consumers (with the possible exception of directors' qualifying shares) from the then holders thereof, and that since such time Consolidated has been, and now is, the holder and owner of all of such issued and outstanding capital stock of Consumers (with the possible exception of directors' qualifying shares).

VIII.

Objector is informed and believes, and upon such information and belief alleges, that on or about July 15, 1929, being a date subsequent to the issuance and sale of said Union bonds, Consolidated acquired all of the outstanding capital stock of Union (with the possible exception of directors' qualifying shares) from the then holders thereof and that since such time Consolidated has been and now is the holder and owner of all of such issued and outstanding capital stock of Union (with the possible exception of directors' qualifying shares).

Objector is informed and believes, and upon such information and belief alleges that on or about July 15, 1929, Consolidated, as party of the one part, and Union, Consumers and Reliance Rock Company, a wholly owned subsidiary of Union, as parties of the other part, entered into that certain Operating Agreement dated July 15, 1929, a copy of which is attached hereto and made a part hereof, marked Exhibit "A". Since the date of entering into said Operating Agreement Consolidated has held and maintained the custody and possession of all of the properties of Union and Consumers, and has used and operated said properties, and has collected the income therefrom, and has applied said income to the uses of Consolidated, in all respects as if said properties belonged to Consolidated.

X

Objector is informed and believes, and upon such information and belief alleges, that on or about February 16, 1933 the parties to said Operating Agreement dated July 15, 1929 purported to enter into a modification of said Operating Agreement, a copy of which purported modification of Operating Agreement is attached hereto and made a part hereof, marked Exhibit "B". That said parties entered into, or purported to enter into, said purported modification of Operating Agreement without the consent of the holders of Union or Consumers bonds or of the trustees under the Union and Consumers trust indentures securing the same. That at the time said purported modification of Operating Agreement dated February 16, 1933 was purported to have been entered into all of the outstanding capital stock of Union and Consumers was owned, and for a long time prior thereto had

been owned, by Consolidated, the directors of Union and Consumers were elected by Consolidated as the owner of all of the outstanding capital stock of Union and Consomers; and the officers of Union, Consumers and Consolidated were identical. Objector alleges that said purported modification of Operating Agreement dated February 16, 1933, was entered into in derogation of the rights of Union and Consumers and of their creditors. particularly the holders of Union and Consumers bonds. and with the intent to deprive such creditors of Union and Consumers of their rights as such creditors. said purported modification of Operating Agreement was, and is, without consideration and should be, and is, void ab initio and of no effect whatsoever in so far as it purports to change, amend or alter the rights of Unico or Consumers, or their creditors, against Consolidated arising out of said operating Agreement dated July 15, 1929, or out of an accounting thereunder, and said purported modification of Operating Agreement should be declared. void and of no force and effect ab initio.

X

Objector is informed and believes, and upon such information and belief alleges, that since the date of acquisition by Consolidated of all of the outstanding capital stock of Union and Consumers, Consolidated has taken over, used, operated and managed all of the business and property of Union and Consumers and from time to time has disposed of uportions of the same, and has made renewals of such property so disposed of, and has wrong-

fully and negligently merged and commingled the business, properties and income of Union and Consumers with the business, properties and income of Consolidated, and the properties of Consumers with the properties of Union, and vice versa, and has wrongfully failed and neglected properly to segregate and keep separate and apart such business and properties of Union and Consumers, and has wrongfully and negligently and in derogation of the rights of Union and Consumers, and of the creditors of Union and Consumers, converted to its own use such business and properties of Consumers and Union and the income accrued and accruing therefrom.

XII.

In connection with the foregoing objections and allegations objector respectfully suggests that the proposed plan of reorganization be modified in the following respects:

- 1. That Consolidated, its assets and stockholders, together with said company as the sole stockholder of Union and Consumers, be entirely eliminated from the plan of reorganization.
- 2. That all assets of Union and Consumers, whether or not now subject to the liens of the indentures securing the outstanding bonds of said companies, be segregated and transferred to the proposed new company.
- 3. That bearer bonds of the new company be authorized in an amount equivalent to the principal amount of bonds of Union and Consumers presently outstanding, and that said new bonds be issued and delivered to the existing bondholders of said companies dollar for dollar.

- 4. That said new corporation be organized with an authorized capital stock, consisting of common shares only, sufficient to:
 - a. Permit one share thereof, to be issued for each \$100.00 of interest accrued and unpaid on account of the presently outstanding bonds.
 - b. Permit one share thereof to be issued to the holders of presently outstanding bonds of Union and Consumers on the basis of one share for each, \$100.00 principal bonded indebtedness.
 - c. Insure suitable treasury stock for future financing.
- 5. That common shares of the new corporation be issued and delivered to the present bondholders of Union and Consumers on the basis provided in the preceding paragraph.
- 6. That provisions be made in the proposed new indenture securing the proposed new bonds, and in said bonds themselves, that no default shall exist thereunder by reason of failure of the corporation to pay interest during the period of one year from date of issue, or such other period of time as to the Court may seem advisable under existing circumstances.
- 7. That working capital for said new company be provided from the proceeds of liquidation of such claims as Union and Consumers may now have against Consolidated on account of the operating agreements hereinbefore referred to, from the sale of the remaining authorized common shares of the new corporation, in whole or in part, and by such borrowings as the future board of directors of said new corporation may authorize.

WHEREFORE, objector prays that orders be made and entered herein as follows:

- 1. Sustaining the objections herein made to the plan of reorganization submitted by Consolidated, the Union Committee, and the Consumers' Committee, filed herein April 28, 1937.
- 2. Adjudicating that all net income of Consolidated derived from the operation and management of the properties subject to the trust indentures securing said Union and Consumers' bonds is subject to the lien and operation of said trust indentures, and directing Consolidated to sequester all such net income for the use and benefit of the trustees under said trust indentures, and of the holders of Union and Consumers' bonds secured thereby, as their interests may appear, subject only to the use of such property by Consolidated in accordance with the orders of this Court.
 - 3. Referring to a special master the following matters:
 - a. The segregation and identification of all of the properties, real and personal, which are subject to the trust indenture dated July 1, 1928, between Consumers Rock & Gravel Company, Inc., and Bank of Italy National Trust & Savings Association, as trustee, (of which Bank of America National Trust & Savings Association is the successor), and all of the properties, real and personal, which are subject to the trust indenture dated September 1, 1927, between Union Rock Company and Title Insurance and Trust Company, as trustee.

- b. The cancellation of said purported modification of Operating Agreement dated February 16, 1933, and the termination of said Operating Agreement dated July 15, 1929.
- c. Rendition of an account as between Union and Consumers, on the one hand, and Consolidated on the other hand, with respect to the property, assets and business of Union and Consumers held, possessed, and managed by Consolidated, and of the rents, issues, income and proceeds thereof, and/or the rendition of an account on termination of the operating agreement dated July 15, 1929; and on the basis of the intercompany accounts, as between Union and Consumers, on the one hand, and Consolidated, on the other.
- d. The determination of the true value of all properties and assets of Union and Consumers as so segregated.
- 4. That an impartial and qualified appraiser be appointed by the Court to appraise all of the properties and assets, real and personal, of Union and Consumers, as segregated and identified by the special master, and to report to the Court prior to final hearing upon the proposed plan of reorganization and objections thereto, to the end that the Court may be fully advised in the premises.
- 5. That an independent auditor and accountant be appointed by the Court and authorized to make a full and complete examination and report of the inter-company business relations between Union and Consumers, on the one hand, and Consolidated, on the other hand, and to report to the special master and the Court the amount of indebtedness owing by any one of said companies to any of the others.

- 6. Authorizing your objector to circulate the foregoing objections, and the foregoing proposed modification of the plan of reorganization submitted by Consolidated, the Union Bondholders' Committee, and the Consumers' Bondholders' Committee, among all holders of Union and Consumers bonds, and requiring the bondholders' committees of Union and Consumers, and the trustees under the Union and Consumers trust indentures, to file with the Court for the purpose of such circulation a true and complete list of the names and addresses of the holders of such bonds.
- 7. Setting a date for the hearing of these objections and the suggested modifications in the plan of reorganization submitted by Consolidated, the Union Bondholders' Committee, and the Consumers' Bondholders' Committee, and fixing the notice to be given of such hearing.
- 8. Such other and further orders, general and specific, which may be necessary in the premises to afford such further, relief as to the Court seems meet and proper.

Dated: Los Angeles, California, August 20", 1937.

E. Blois duBois Objector

MOTT, VALLEE & GRANT By Kenneth E. Grant Attorneys for Objector

John G. Mott Paul Vallee Kenneth E. Grant

[For Exhibits A and B hereto attached see Operating Agreement and Modification of Operating Agreement attached to Master's Report.]

STATE OF CALIFORNIA,)

SS

County of Los Angeles,

E. BLOIS duBOIS being by me first duly sworn, deposes and says: that he is the Objector in the above entitled action; that he has read the foregoing Objections to Plan of Reorganization submitted by Consolidated Rock Products Co., etc. and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

E, Blois duBois

Subscribed and sworn to before me this 20" day of August, 1937

[Seal].

Katherine Spengler

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 46 min. past 4 o'clock Aug. 25, 1937 P. M. By F. Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

No. 25816-H

PETITION FOR HEARING FOR PROPOSAL, CONSIDERATION AND CONFIRMATION OF THE PLAN OF REORGANIZATION FOR CONSOLIDATED ROCK PRODUCTS CO., UNION ROCK COMPANY AND CONSUMERS ROCK & GRAVEL COMPANY, INC., DATED MARCH 15, 1937.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

This petition of CONSOLIDATED ROCK PROD-UCTS CO., Debtor herein; and F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight, and Walter S. Taylor; as the UNION ROCK COMPANY BONDHOLDERS' PROTECTIVE COMMITTEE constituted by and acting under Union Rock Company Bondholders' Protective Agreement dated as of May 23, 1935, between said Committee and such holders of First Mortgage Serial and Sinking Fund Gold Bonds of Union Rock Company as have become parties thereto in the manner therein provided; and Wm. D. Courtright, Fred L. Dreher, F. J. Gay, Alfred Ginoux, and Guy Witter, as the CONSUMERS ROCK & GRAVEL COMPANY, INC., BONDHOLDERS' PROTECTIVE COMMITTEE constituted by and acting under Consumer's Rock & Gravel Company, Inc., Bondholders' Protective Agreement dated June 1, 1935, between said Committee and such holders of First Mortgage Sinking Fund Gold Bonds of Consumers Rock & Gravel

Company, Inc., as have become parties thereto, in the manner therein provided (said Debtor and said bondholders' committees being hereinafter sometimes referred to as "petitioner"), respectfully states:

T

That under date of April 16, 1937 petitioners filed herein their petition submitting a Plan of Reorganization dated March 15, 1937 and under date of April 23, 1937 the Honorable Harry A. Hollzer, Judge of the above entitled Court, signed an order authorizing the submission of said Plan of Reorganization to the creditors and stockholders of debtor, Consolidated Rock Products Co., and its subsidiaries, Union Rock Company and Consumers Rock & Gravel Company, Inc.

II.

That the securities of debtor and its said subsidiaries outstanding at the present time are as follows:

- (a) Consolidated Rock Products Co.
 - (1) 285,947 shares of preferred stock, without par value.
 - (2) 397,455 shares of common stock, without par value.
- (b) Union Rock Company
 - (1) \$1,979,500, principal amount of First Mortgage Serial and Sinking Fund Gold Bonds, \$102,500, principal amount of which is owned by Consolidated Rock Products Co. and the balance is in the hands of the public.
 - (2) 160,000 shares of Class "A" capital stock.
 - (3) 400,000 shares of Class "B" capital stock.

- (c) Consumers Rock & Gravel Company, Inc.
 - (1) \$1,200,500 principal amount of First Mortgage Sinking Fund Gold Bonds, \$63,500, principal amount of which is owned by Consolidated Rock Products Co. and the balance is in the hands of the public.
 - (2) 120,328 shares of common capital stock.

All of the aforesaid capital stock of Union Rock Company and Consumers Rock & Gravel Company, Inc. is owned either directly or indirectly by Consolidated Rock Products Co.

III.

That since the execution and under the authority of said order petitioners have submitted to all known creditors and stockholders of said debtor and its said subsidiaries the said Plan of Reorganization, letters of explanation, summary of said Plan of Reorganization, forms of written acceptance of said Plan and letters of transmittal, all in the form attached to said petition dated April 16, 1937 and approved in said order of April 23, 1937.

IV.

That there are no creditors of either Consolidated Rock Products Co. or its two said subsidiaries other than current creditors and said bondholders. In this connection, petitioners state that neither said Union nor Consumers has any current creditors but that such current creditors as there are, are those of Consolidated. Further, in this connection, Consolidated Rock Products Co., one of the petitioners, states that the said bonds outstanding are direct obligations only of the said Companies which issued them and have not been assumed by Consolidated. That

as of the date of this petition said Plan of Reorganization dated March 15, 1937 has been accepted in writing by the various security holders as follows:

- (a) Consolidated Rock Products Co.
 - (1) 175,196 shares of preferred stock or 61.2 percentage.
 - (2) 197,200 shares of common stock or 49.6 percentage.
- (b) Union Rock Company
 - (1) \$1,358,500 in principal amount, or 68.63 percentage.
 - (2) All of the outstanding capital stock of both classes.
- (c) Consumers Rock & Gravel Company
 - (1) \$867,500 in principal amount, or 72.3 per-. centage.
 - (2) All of the outstanding common capital stock.

V.

That the said Plan of Reorganization dated March 15, 1937, which is hereby proposed and which has been approved by more than 25% in amount of a class of creditors and more than 10% in amount of all claims against the debtor and its subsidiaries whose claims would be affected by the Plan, provides in general for the transfer of all of the properties of Consolidated, Consumers and Union to a new corporation which is to be organized for the purpose, with a capital structure consisting of new bonds, new preferred stock, and new common stock. The aggregate principal amount of the new bonds is to be one-half of the aggregate principal amount of Consumers and

Union bonds outstanding in the hands of the public, excluding the Consumers and Union bonds held by Consolidated. Such new bonds are to be secured by a new. indenture covering substantially all of the properties of the new corporation. The new preferred stock is to be of the par value of \$50 per share, and its aggregate par value will equal the remaining one-half of the principal amount of the bonds of Union and Consumers outstanding in the hands of the public as aforesaid. The new common stock is to be of the par value of \$2.00 per share. The new bonds and the new preferred stock are each to be divided into two series, designated Series U and Series C, respectively. Each holder of a \$1,000 present Union bond will be entitled to receive a new \$500 Series U bond and 10 shares of new Series U preferred stock, together with warrants entitling him to purchase 20 shares of new common stock at any time during a period of five years at prices ranging from \$2 to \$6 per share. Each holder of a \$1,000 present Consumers bond will receive the same securities as the holder of a \$1,000 Union bond, except that his new bonds and preferred stock will be of Series Each holder of present preferred stock of Consolidated will be entitled to receive one share of new common stock for each share of such preferred stock, and each holder of present common stock of Consolidated will be entitled to receive for each 5 shares of sach present common stock a warrant entitling him to purchase one share of new common stock at at any time within three months after the date of such warrant, at the price of \$1 per share.

The new bonds are to be dated as of April 1, 1937, and are to mature on April 1, 1957, and are to bear interest from April 1, 1937, regardless of the date of actual consummation of the Plan, at the rate of five per cent

per annum, payable out of available net income as defined in the Plan, but such interest shall be cumulative. ing-fund for the retirement of the new bonds is provided out of available net income, sufficient to retire annually approximately four per cent of the principal amount of the new bonds originally essued, on a cumulative basis. Dividends on the new preferred stock are to be at the rate of five per cent per annum of its par value and are to be noncumulative until such time as the corrresponding series of new bonds shall have been retired, and thereupon shall become cumulative. A sinking fund for the retirement of the new preferred stock is provided, which will not operate until the corresponding series of the new bonds has been retired, and will then be sufficient to retire annually on a cumulative basis approximately four per cent of the amount of new preferred stock originally issued.

The available net income of the new corporation, as defined in the Plan, is to be divided into two equal parts, one of which is to be applied to servicing the new Series U bonds and preferred stock, and the other to servicing the new Series C bonds and preferred stock. Provision is also made for the application of proceeds to be received from the sale of nonessential properties, to the retirement of new bonds and preferred stock at the most advantageous prices obtainable, in a manner, which should tend to equalize within a reasonable time the amounts of the respective series of the new bonds and preferred stock outstanding.

The voting rights on the stock of the new corporation will be divided in such a way that the holders of the new common stock will be entitled to elect/five out of nine directors, and the holders of each of the series of new preferred stock will be entitled to elect two directors, with the result that the persons who are now stockholders of Consolidated will be entitled to elect five out of nine directors of the new corporation, and the persons who are now bondholders will be entitled to elect four out of the nine directors of the new corporation. The Plan further provides that if the new corporation fails to make certain minimum payments by way of interest on the new bonds or dividends on the new preferred stock, the holders of the new preferred stock will become entitled to elect six out of the nine directors, and the common stockholders of the new corporation will then be entitled to elect three directors, thus affording to persons who are present bondholders the opportunity of obtaining voting control of the new corporation under circumstances which would appear to warrant such control.

VI.

That the Plan provides that the following obligations shall be paid in full:

- (a) All current creditors;
- (b) All claims of the United States of America, if any;
- (c) All cost, expense, attorneys' fees, committees' fees and kindred items approved by the Court, either
- in cash or in such securities as may be acceptable to such parties.

VII.

That petitioners believe and request that the creditors and stockholders should for the purposes of the Plan and its acceptance be classified as follows:

- (a) Consolidated Rock Products Co.
 - (1) Holders of 285,947 shares of preferred stock, without par value.
 - (2) Holders of 397,455 shares of common stock, without par value.
- (b) Union Rock, Company
 - (1) Holders of \$1,979,500, principal amount of First Mortgage Serial and Sinking Fund Gold Bonds.
 - (2) 160,000 shares of Class "A" capital stock.
 - (3) 400,000 shares of Class "B" capital stock.
- (c) Consumers Rock & Gravel Company, Inc.
 - (1) Holders of \$1,200,500, principal amount of First Mortgage Sinking Fund Gold Bonds.
 - (2) Holders of 120,328 shares of common capital stock.

VIII

That due to the number of securities of Consolidated, Union and Consumers outstanding, the extent of the public dealing therein and the insufficiency of any available accurate record showing the transfers thereof, the filing of a statement with respect to the purchase or transfer of said securities by those accepting the Plan would be impractical.

That under date of November 15th, 1935 the debtor and said subsidiaries filed a petition herein showing the proposed revision of certain unexpired leases thereof; that under date of February 6, 1936 this Honorable Court entered its order approving the modifification of said leases in the manner set forth in said petition; that under date of October 11, 1935 this Honorable Court entered its order permitting the cancellation of the Union-Bradbury Estate Company lease and that there are no other executory contracts other than the commitments which the debtor has made in the operation of its business subsequent to the filing of the original petition herein.

X

That petitioners believe and therefore allege that said Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; that it complies with the provisions of Subdivision (b) of Section 77B of the Bankruptcy Act and that it is unnecessary to comply with the provisions of Subdivision (e), Clause (2) of said Section because neither the debtor nor either of its said subsidiaries is a public utility corporation, wholly intrastate in character or is a utility subject to the jurisdiction of a regulatory commission or commissions, or other regulatory authority or authorities.

That petitioners believe that prior to the date of hearing a majority of the common capital stock of Consolidated will have accepted the Plan of Reorganization. Even though such acceptance is not then in, petitioners believe that the Plan of Reorganization should be confirmed by this Honorable court without it.

That objections have been filed to said Plan of Reorganization on behalf of an individual who is alleged to own bonds of both said subsidiary Companies; that said objector has asked for a hearing on his said objections and that petitioners request that said objections and any others which may be filed to said Plan be heard at the time set in the order granted pursuant to this petition.

WHEREFORE, petitioners pray that an order be immediately entered herein setting a date and time of a hearing for the purpose of the proposal, consideration and confirmation of the said Plan of Reorganization, dated March 15, 1937, upon such notice as the Court may prescribe and that immediately following said hearing an order be entered herein as follows:

- (A) Dividing the creditors and stockholders for the purpose of the Plan of Reorganization and its acceptance into the classes according to the nature of their respective claims and interest as prayed for in the petition as follows:
 - (a) Consolidated Rock Products Co.
 - (1) Holders of 285,947 shares of preferred stock, without par value.
 - (2) Holders of 397,455 shares of common stock, without par value.
 - (b) Union Rock Company
 - Holders of \$1,979,500, principal amount of First Mortgage Serial and Sinking Fund Gold Bonds.
 - (2) 160,000 shares of Class "A" capital stock.
 - (3) 400,000 shares of Class "B" capital stock.

- (c) Consumers Rock & Gravel Company, Inc.
 - (1) Holders of \$1,200,500, principal amount of First Mortgage Sinking Fund Gold Bonds.
 - (2) Holders of 120,328 shares of common capital stock.
- (B) Finding that the Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any creditors and stockholders and is feasible and complies with the various provisions of said Section 77B.
- (C) If, at the time of the hearing on confirmation the Plan has not been accepted by or on behalf of common stockholders of Consolidated Rock Products Co. holding a majority of said common stock, that the Court find either:
 - (1) That the Plan provides, in respect to such holders of common stock, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor and subsidiaries dealt with by the Plan, or
 - (2) That the debtor, Consolidated Rock Products Co. is insolvent with respect to the common capital stock, and that the holders of such common capital stock have no equity in the property of the debtor or the subsidiaries dealt with by the Plan.
 - (D) Confirming the said Plan of Reorganization.
- (E) Granting such other and further relief as to the Court may seem just and equitable.

Dated at Los Angeles, California, September 28, 1937.

(CORPORATE SEAL)

CONSOLIDATED ROCK PRODUCTS CO.

By Robt Mitchell . Its Vice President.

And J. R. Allder Its Assistant Secretary.

Deptor.

LATHAM, WATKINS & BOUCHARD,

By Paul R. Watkins

Attorneys for Consolidated Rock Products Co.

UNION ROCK COMPANY BONDHOLD. ERS' PROTECTIVE COMMITTEE

By F. B. Badgley

(F. B. Badgley)

By R. E. Frith

(R. E. Frith)

T. Fenton Knight

(T. Fenton Knight)

Walter S. Taylor (Walter S. Taylor)

Union Committee.

O'MELVENY, TULLER & MYERS,

And Graham L. Sterling, Jr.

Attorneys for Union Rock Company Bondholders' Protective Committee.

CONSUMERS ROCK & GRAVEL COM-PANY, INC., BONDHOLDERS' PRO-TECTIVE COMMITTEE

> By F. J. Gay (F. J. Gay)

> > Guy Witter (Guy Witter)

Alfred Ginoux (Alfred Ginoux)

Being a majority of the members of said Consumers Committee.

PETITIONERS.

GIBSON DUNN & CRUTCHER,

By T. H. Joyce

Attorneys for Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee.

STATE OF CALIFORNIA)

SS COUNTY OF LOS ANGELES)

ROBT. MITCHELL, being duly sworn, deposes and says that CONSOLIDATED ROCK PRODUCTS CO., one of the petitioners in the foregoing petition, is a corporation and that affiant is an officer thereof, to wit, a vice president, and makes this verification for and on behalf of said corporation; that affiant has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

Robt Mitchell

Subscribed and sworn to before me this 30th day of September, 1937.

[Seal] Isobel V. Hughes

Notary Public in and for said County and State.

STATE OF CALIFORNIA

SS.

COUNTY OF LOS ANGELES)

T. FENTON KNIGHT, being duly sworn, deposes and says that he is a member of UNION ROCK COMPANY BONDHOLDERS' PROTECTIVE COMMITTEE, one of the petitioners in the foregoing petition, and makes this verification for and on behalf of said Bondholders' Committee; that affiant has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

T. Fenfon Knight

Subscribed and sworn to before me this 30th day of September, 1937.

[Seal]

Helen La Voy

Notary Public in and for said County and State

My Commission Expires November 20, 1940

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

GUY WITTER, being duly sworn, deposes and says that he is a member of CONSUMERS ROCK & GRAVEL COMPANY, INC., BONDHOLDERS' PROTECTIVE COMMITTEE, one of the petitioners in the foregoing petition, and makes this verification for and on behalf of said Bondholders' Committee; that affiant has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

Guy Witter

Subscribed and sworn to before me this 29 day of September, 1937.

[Seal]

John S. Thomson

Notary Public in and for said County and State.

My Commission Expires May 10, 1939

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 3 min. past 2 o'clock Oct. 1, 1937 P. M. By M. R. Winchell, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

Supplemental Objections of E. Blois duBois to Plan of Reorganization submitted by Consolidated Rock Products Company, Union Rock Company Bondholders' Committee, and Consumers Rock & Gravel Company, Inc., Bondholders' Committee, dated March 15, 1937, and filed herein April 28, 1937.

To the Honorable Judges of the United States District Court, for the Southern District of California, Central Division:

Comes now E. BLOIS duBOIS, who has heretotore filed herein his written Objections to the Plan of Reorganization filed April 28, 1937, and by way of supplement to said Objections now on file, makes the further objections to confirmation of said Plan, as follows:

T.

That confirmation of said plan as presented will deprive objector of his property without due process of law, contrary to the Fifth Amendment of the Constitution of the United States, and Objector hereby invokes in opposition to said plan and its confirmation by said court, the Constitution of the United States and particularly the Fifth Amendment thereof.

II.

That Section 77 B of the Bankruptcy Act, as amended, is in contravention of the Fifth Amendment of the Constitution of the United States, in that it deprives a per-

son, in this case objector, of property without due process of law.

Respectfully submitted,

MOTT, VALLEE AND GRANT,
John G. Mott

Paul Vallee

Kenneth E. Grant

Attorneys for E. Blois duBois.

Received copy of the within Supplemental Objections of E. Blois duBois to Plan of Reorganization submitted by Consolidated Rock Products Company, Union Rock Company Bondholders' Committee, and Consumers Rock & Gravel Company, Inc. Bondholders' Committee, dated March 15, 1937, and filed herein April 28, 1937,—this 21st day of October, 1937.

O'MELVENY, TULLER & MYERS,

By Milton A. Taylor

Attorneys for Union Rock Company Bondholders Protective Committee.

LATHAM, WATKINS & BOUCHARD, By Paul R. Watkins

Attorneys for Consolidated Rock Products Co.

GIBSON, DUNN & CRUTCHER,

Br. T. H. Joyce

Attorneys for Consumers Rock & Gravel Co., Inc. Bondholders' Protective Committee.

David R. Faries by WRH (David Faries)

Attorney for The Miller Committee of Stockholders of Consolidated Rock Products Company

ALERED E ROGERS

(Alfred E. Rogers)

Attorney for T. C. Rogers

STATE OF CALIFORNIA)

County of Los Angeles)

KENNETH E. GRANT being by me first duly sworn, deposes and says: that he is one of the attorneys for E. Blois duBois, Objector in the above entitled action; that he has read the foregoing Supplemental Objections of E. Blois duBois to Plan of Reorganization, etc. and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That said E. Blois duBois is now absent from the State of California and for said reason affiant makes this verification for and in his behalf.

*Kenneth E. Grant

Subscribed and sworn to before me this 21st day of October, 1937

[Seal]

Katherine Spengler

Notary Public in and for the County of Los Angeles. State of California.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 36 min past 4 o'clock, Oct. 21, 1937 P. M. By M. R. Winchell Deputy Clerk.

FINDINGS AND REPORT OF SPECIAL MASTER.

A. Hollzer, United States District Judge, sitting at Los Angeles, California, designated and appointed Frank P. Doherty as Special Master to hear the plan of reorganization of Consolidated Rock Products Company, Union Rock Company and Consumers Rock & Gravel Company, Inc., dated March 15, 1937, and all matters in connection therewith, including any and all objections to said plan of reorganization other than as to its constitutionality, and report promptly upon all matters brought before the Special Master pursuant to the order of his appointment, and to include in the Special Master's report a form of order to be made and entered on such report and directing the Special Master with respect to the filing of said report and giving notice thereof.

Thereafter said Frank P. Doherty qualified as Special

On the 8th day of November, 1937, pursuant to notice to all interested parties, said plan of reorganization came on for hearing. The following persons were present: Mr. Graham L. Sterling, Jr., and Mr. Paul Fussell, of the law firm of O'Melveny, Tuller & Myers, representing the Union Rock Company Bondholders' Protective Committee; Mr. Thomas H. Joyce and Mr. H. F. Prince, of the law firm of Gibson, Dunn & Crutcher, representing the Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee; Mr. Paul R. Watkins, of the law firm of Latham, Watkins & Bouchard, representing the Debtors; Mr. Stanley Arndt, representing a committee of preferred stockholders of Consolidated Rock

Products Co., the Debtor: Mr. Kenneth Grant, of the firm of Mott, Vallee & Grant, representing E. Blois duBois, a holder of bonds of both the Union and Consumers companies and an objector to the plan; Mr. E. S. Williams, appearing in propria persona as the owner of \$7,000 principal amount of Union Rock Company bonds: Mr. Alfred E. Rogers, representing Mr. Thomas C. Rogers, a Union Rock Company bondholder; and several members and representatives of the aforesaid bondholders' protective committees, and other individual bondholders and stockholders. Said hearing took place and was conducted before the Special Master in the Title Insurance Building, 433 South Spring Street, Los Angeles. hearing proceeded from November 8, 1937, and was heard on the following dates: November 9, 10, 12, 15, 16, and 17, 1937. At the conclusion of said hearing, counsel for the respective parties filed memoranda of points and authorities, and the matter then was submitted to the Special. Master for report and recommendations.

Pursuant to the order appointing the Special Master, no constitutional question was to be considered or passed upon by the Special Master as a part of said hearing or to be included in the Findings and Report. Likewise during the hearing the Special Master declined to pass upon the following matters: (a) the amount of compensation to be paid to the respective attorneys for services rendered or to be rendered in and about said reorganizations, and other matters connected or associated with it; (b) the compensation to be paid to the secretary or the members of the respective bondholders' and stockholders' protective committees. The Special Master announced that in his opinion passing on these matters would involve services rendered subsequent as well as prior to the date of the

hearing and that they were matters peculiarly within the province of the United States District Court and should not be made a part of the Findings or Report of the Special Master.

It was stipulated by all parties that the Special Master should have access to and take into consideration, in making Findings and Report, the complete files and records in this case.

The firm of court reporters employed by the Federal Government under contract reported the proceedings before the Special Master.

Both oral and documentary evidence was introduced and considered by the Special Master. The documentary evidence consisted of exhibits introduced and admitted into evidence before the Special Master in addition to the files and records of said case above referred to. following witnesses testified in person: Mr. R. L. Rasmussen from the Trust Department of Bank of America National Trust and Savings Association; Mr. E. H. Booth, Jr., of the Trust Department of Title Insurance and Trust Company; Mr. Carl P. Smith of Citizens National Trust & Savings Bank of Los Angeles; Mr. T. Fenton Knight, secretary of the Union Rock Company Bondholders' Protective Committee; Mr. Guy Witter, Chairman of the Consumers Bondholders' Committee: Mr. Graham L. Sterling, Jr.; Mr. Robert Mitchell, Vice President of Debtor; Mr. Thomas C. Rogers; Mr. Henry C. Chase; Mr. Louis Van Gelder; and Mr. Frank Gautier.

After the submission of said matter, the Special Master herewith submits Findings of Fact and Report to the Honorable Harry A. Hollzer, United States District Judge of the above entitled court.

FINDINGS OF FACT AND REPORT

PRELIMINARY HISTORY OF CORPORATIONS INVOLVED IN AND CONNECTED WITH PLAN OF REORGANIZATION.

In the year 1929 and prior thereto there existed in Southern California, with their principal properties located in and about the County of Los Angeles, several . companies engaged in the business of mining, processing, shipping and selling rock, sand and gravel. The companies doing the major portion of this type of business were Union Rock Company, a Delaware corporation, Consumers Rock & Gravel Company, Inc., a Delaware corporation, and Reliance Rock Company, a Delaware corporation. For purposes of brevity, Union Rock Company will hereinafter be referred to as the Union Company, Consumers Rock & Gravel Company, Inc., will hereinafter be referred to as the Consumers Company, and Reliance Rock Company will be hereinafter referred to as the Reliance Company. There were other minor companies in which one or the other of the above three companies had an interest, but the three companies mentioned were the principals in the consolidation hereinafter referred to in more detail. It should be noted that the term "consolidation" as used in this Report does not mean a statutory consolidation resulting in the termination of the respective corporate entities of the constituent corporations, but rather a business or operating consolidation having for its purpose the joint operation and ownership of the properties through ownership of the capital stocks of the various corporations. As a part of the consolidation, the Reliance Company became a subsidiary of the Union Company through the ownership of all of the stock of the Reliance Company by the Union Company.

George Rogers, now deceased, who had substantial financial interests in the rock business and had long experience in this particular industry, appears to have originally planned the consolidation of the Union, Consumers and Reliance companies. In order to accomplish and carry through the plan, it was necessary to have what in effect were two distinct consolidations, the first of which involved the Union and Reliance companies. This was brought about by the stockholders of the Reliance and the Union companies' depositing their stock in escrow. The Union Company amended its articles and provided for the reclassification and increase of the number of shares of its capital stock, and this capital stock as increased and reclassified was issued to five voting trustees under a voting trust agreement. The trustees then issued voting trust certificates to the slockholders of the Reliance and Union companies in the proportions which had been previously agreed upon. The capital stock of the Reliance Company was transferred to the Union Company, which made the Reliance Company a wholly owned subsidiary of the Umon Company and thus completed the first of the two consolidations, namely, the Union Company became the owner of call the stock of Reliance Company and the stock of the Union Company was held by voting trustees, who in turn had issued their voting trust certificates in agreed proportions to the former stockholders of the two companies. Compliance was had with the Corporate Securities Act of the State of California, and a permit was issued in the early part of 1929 authorizing the issuance of the voting trust certificates. Although the Reliance Company was wholly owned by Union, it still retained its corporate entity. At the time the consolidation of the Union and Reliance companies was taking place, negotiations were being conducted for a consolidation of the Union Company and the Consumers Company. To bring about this consolidation, Consolidated Rock Products Company, the Debtor, was organized under the laws of the State of Delaware on January 28, 1929. The consolidation plan contemplated that the Debtor, hereinafter referred to as Consolidated, was to operate the properties of the Union Company, its subsidiaries, Consumers Company, its subsidiaries, and the Reliance Com-The Consolidated as a part of the plan of consolidation acquired all of the outstanding capital stock of the Union and Consumers companies. Prior to the consolidation, both the Union and the Consumers companies had outstanding bond issues secured by trust indentures upon their respective properties, said trust indentures being exhibits introduced at the hearing before the Special Master. The bonds of the Union and Consumers companies were not affected by the change of ownership inasmuch as they continued as first mortgages and liens on the properties of their respective issuing companies. The mechanics of bringing about the final step of the consolidation, that is, the organization of Consolidated and the ownership by Consolidated of the stock of the Union Company and the Consumers Company, were substantiaily as follows: Local bond and investment houses obtained options on the stock or voting trust certificates. of the Union Company and likewise of the Consumers These securities were then transferred to Con-Company. solidated, in return for which Consolidated issued its capital stock to the bond and investment houses or their nominees as named in the application to the Corporation Commissioner. The stock of Consolidated, so issued to the bond and investment houses, was disposed of in the usual course of business of said investment houses, that is, by delivering some of said stock to the stockholders

of the Union Company and Consumers Company, and by sale of said stock also to the public. At the time of the consolidation, the Union Company and the Consumers Company, and their respective subsidiaries, did over seventy-five per cent of the rock, sand and gravel business in Southern California. The Union Company and the Consumers Company had been engaged in the rock, cravel and sand business for several years prior to the consolidation, and owned or leased rock, gravel and sand déposits at strategic points from Santa Barbara County on the north to San Diego County on the south, and as far east as San Bernardino. The products of said companies, that is, crushed rock, washed and screened gravel, and sand, were used in the construction and maintenance of railroads, highways, streets, buildings, irrigation, flood control, and reclamation projects. They were basic commodities used in all structural and concrete works. time of the consolidation, that is, in the early part of 1929, great industrial and other activity requiring the use of the products of the companies existed. In addition to the rock, gravel and sand deposits, which at that time consisted of approximately twenty-three producing plants, the constituent companies also owned, operated or leased various distributing bunker plants strategically lo-In excess of 2,000 acres of deposits were owned in fee by these companies, and nearly 3,000 acres were held under lease. Prior to the consolidation, all three companies, namely, Union Company, Consumers Company, and Reliance Company, were in competition and supplying the same general trade area, the major market being located in and around the City of Los Angeles. The companies owned in excess of 200 motor trucks adapted to the use of this type of business. The consolidation brought under one control what appeared to be all factors

necessary to bring about economy of operation and production and the elimination of duplicated facilities in all departments, particularly production, transportation and It likewise had the advantage of allocating territory to various of the operating plants, which would have the effect of eliminating duplicated trucking. Under the consolidation, estimated earnings, after paying bond interest, all taxes and preferred dividends, would leave in excess of half a million dollars in annual profits. An appraisal of the properties of the Union Company, Consumers Company and Reliance Company had been made by J. G. White Engineering Corporation of New York in the spring of 1928. The appraisers fixed the value of the properties at approximately \$15,000,000. sequent to the appraisals, other properties were purchased by the Union, Consumers and Reliance companies which had an appraised value of approximately \$1,500,000. Thus the consolidation brought under one control properties of an appraised value in excess of \$16,000,000. As of the date of the consolidation there was approximately \$4,000,000 represented by outstanding bonds of Union and Consumers, respectively. The consolidation appears to have been very carefully planned and to have had every indication of being a successful enterprise.

The consolidation contemplated Consolidated's issuing approximately 300,000 shares of preferred stock without par value, carrying liquidation preference of \$25 per share and a dividend rate of \$1.75 per share, and issuing approximately 400,000 shares of common stock without par value. Approximately the above number of shares of preferred and common stock, respectively, were issued. The major portion of the stock appears to have been sold in units of two shares of preferred and one share of common, for \$58 per unit.

At the completion of the consolidation and to carry out the intent and purpose of those who initiated and carried through the consolidation, an agreement was entered into between Consolidated and its three principal, wholly-owned subsidiaries, Union, Consumers and Reliance, termed an Operating Agreement, dated July 15,.. 1929, but effective as of April 1, 1929. A true copy of the operating agreement of July 15, 1929, is annexed tothese Findings and Report and made a part hereof. At the time of the execution of said agreement, Consolidated owned all of the stock of the Union Company; which in turn owned the stock of the Reliance Company. Consolidated likewise owned all the stock of the Consumers Company. Consolidated and the Union, Consumers and Reliance companies all maintained separate corporate entities. However, the directors of Consolidated selected and chose the directors of its subsidiaries, namely, Union Company, Consumers Company and Reliance Company. The operating agreement was therefore a contract negotiated between and executed by the officers of Consolidated on behalf of Consolidated and also acting on behalf of the Union Company, the Consumers Company and the Reliance Company, all of which were, directly or secondarily, wholly owned subsidiaries of Consolidated.

The operating agreement of July 15, 1929, contained this express provision:

"It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for the benefit of any third person as that term is used in Sec-

tion 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereof."

Under the terms of the operating agreement, the Union Company, Consumers Company and Reliance Company ceased all operating functions, and the entire management and operation and financing of the business and properties of the consolidated companies were made obligatory upon Consolidated. As of the date of the consolidation, the Union Company had outstanding bonds secured by its properties in the principal amount of approximately \$2,400,000 par value, and the Consumers Company had outstanding bonds secured by its properties in the principal amount of approximately \$1,500,000 par value. The operating agreement further provided that the cash, securities, notes, and bills and accounts receivable, book. accounts, manufactured materials and materials in process, as well as contracts for the sale of materials of both Union and Consumers companies, should be transferred to Consolidated. The same was true with respect to the cash, securities, notes, and bills and accounts receivable, book accounts, manufactured materials and materials in process and rawsmaterials and contracts for the sale of materials of the Reliance Company. As of March 31, 1929, the balance sheet of the Union Company shows assets consisting of nearly \$10,000,000, and liabilities of approximately \$2,600,000. Reference is made to Special Master's Exhibit No. 14 for details of assets and lia-: bilities of the Union Company. The properties of the Union Company in this exhibit, exclusive of current assets of cash and accounts receivable, were given a value in excess of \$6,500,000 after allowances had been made

for depreciation, depletion and amortization of leaseholds. The current assets consisted of over \$300,000 in cash and in excess of \$300,000 in accounts receivable. The Consumers Company, as shown by the balance sheet of March 31, 1929, had total assets of approximately \$6,000,000, with total liabilities of approximately \$2,000.000. The properties of the Consumers Company were carried on this balance sheet, after reserves for depreciation and depletion had been made, at a valuation of approximately \$5,000,000. In addition the current assets consisted of approximately \$80,000 in cash and customers' accounts, accounts and notes receivable aggregating approximately \$450,000. Reference is made to Special Master's Exhibit No. 15 for further details. The balance sheet of the Reliance Company as of March 31, 1929, showed substantial assets, but much less than that of either the Union Company or Consumers Company. The operating properties of Reliance Company, consisting of land and plant equipment, were valued in the balance sheet at approximately \$1,500,000, with current assets of approximately \$84,000 and current liabilities of approximately \$225,000. The valuations of the properties set forth in the balance sheets of the Union, Consumers and Reliance companies were approximately those fixed by J. G. White Engineering Corporation.

The Consolidated Rock Products Co. in its first balance sheet as of May 31,1929, which reflected its assets and liabilities as of the date of the consolidation, is shown in detail in Special Master's Exhibit No. 20. The Consolidated balance sheet of May 31, 1929, shows an item of \$400,000 due on capital stock subscriptions. The testimony showed that Consolidated likewise had purchased rolling stock consisting of automobiles and trucks, and

acquired other properties in addition to that taken over in the consolidation.

Although the Union, Consumers and Reliance companies and their respective subsidiaries maintained their separate corporate entities and consolidated was to act as the operating agency for these subsidiaries, to all intents and purposes as shown by the Consolidated balance sheet of May 31, 1929, Special Master's Exhibit No. 20, the properties of these subsidiaries (Union, Consumers, Reliance) were carried upon the books of Consolidated as assets of Consolidated, and the liabilities of these subsidiaries were carried as liabilities of Consolidated. This included the bonded debt of both the Union and Consumers companies, which as of May 31, 1929, amounted to \$3,880,000.

The evidence established that subsequent to the consolidation, the separate corporate entities of the subsidiaries of Consolidated, namely, Union and its subsidiaries, Consumers and its subsidiaries, and Reliance, were treated as separate corporate entities in name only and Consolidated assumed all of the functions not only of an operating company but also those of company ownership. The depreciation and depletion and amortization items set forth in the above referred to balance sheets of the Union, Consumers, Reliance and Consolidated companies were on the basis of the valuations given the assets of the respective properties at the time of the consolidation.

The operating agreement of July 15, 1929, was modified by an agreement dated February 16, 1933. A true copy of said agreement of February 16, 1933, is annexed to and made a part of these Findings and Report. The agreement of February 16, 1933, modifying the agreement of July 15, 1929, is typical of the finding that Con-

solidated assumed every function of management and ownership of all the properties of itself and its subsidiaries. This agreement, although purporting to be made between Reliance, Consumers, Union and Consolidated, was executed by Mr. Twaits, as President, and Mr. Mitchell, as Secretary, of Consolidated and acting in identically the same capacity for the Union Company, the Consumers Company and the Reliance Companies. The agreement of February 16, 1933, modifying the operating agreement of July 15, 1929, materially changed the depreciation item to be credited by Consolidated to the Union, Consumers and Reliance companies as contemplated and provided for in the original agreement of July 15, 1929. Both of the agreements, namely, the original operating agreement of July 15, 1929, and its modification as of February 16, 1933, were in fact agreements between these companies acting through the same directors and officers, or their immediate agents or employees. It was undoubtedly the intent of the officers and directors of Consolidated, who acted for Consolidated and likewise for all of the wholly owned subsidiaries, to work out some feasible and practical plan to do away with the inconvenience of duplicated and overlapping ownership and operations and to bring about more efficient and economical management, and at the same time to preserve the subsidiaries of Consolidated, namely, Union, Consumers and Reliance companies, as independent corporate entities for purposes of accounting and income tax and so as not to violate or breach any of the provisions of the trust indentures securing the bond issues of the Union and Consumers companies.

At the time of the consolidation in 1929, the Union Company and its subsidiaries, including the Reliance Company, made the largest contribution in the form of

acreage of properties owned in fee and in bunker sites. The Consumers Company made a substantial contribu-'tion: in fee acreage less than one-half of that of the Union Company, but in leasehold acreage approximately twice that of the Union Company. Under the plan of operation and by reason of subsequent developments, it was contemplated and made necessary that the most efficient plants of the subsidiaries be operated and others be shut down. Following the consolidation, the operation of Consolidated was exposed to the worst financial and business depression in our history. Building activity was at a standstill. The price levels and sales were such as to render the operation of the properties at a reasonable profit impossible. Following the consolidation, competing companies entered the field, with the result that from transacting approximately seventy-five per cent of the total business in this territory, the consolidated companies gradually were able to do little more than onethird of the total tonnage in the Los Angeles market. So disastrous was the depreciation to the business of Consolidated that a revaluation of all the physical properties of Consolidated and its subsidiaries (Union, Consumers and Reliance) as of May 1, 1931, referred to as the Jeffries-Wittenberg Appraisal, fixed their value as of the date of May 1, 1931, at approximately \$4,414,425. These were substantially the same properties which two years prior to that date were set up on the books of Consolidated at a valuation in excess of \$16,000,000. Reference is made to Special Master's Exhibit No. 29 for the details of this re-appraisal and valuation, Mr. W. P.

Jeffries and Mr. Wittenberg were connected with Consolidated, being at said time a member of its board of directors and an employee, respectively. It is impossible to eletermine at this time whether the original valuations of in excess of \$16,000,000 were inflated values beyond and above their reasonable value, or the Jeffries-Wittenberg appraisal was excessively deflated. The evidence would indicate that the original valuation of \$16,000,000 was fixed upon the expectation that the prosperity that existed in 1929 and previous years was to continue unabated. Developments since 1931 indicate that the total valuations fixed by Mr. Jeffries and Mr. Wittenberg in 1931 are the more reasonable and accurate. no evidence to show or reason to believe that any advantage would be gained by Consolidated or its subsidiaries by having the valuations of the properties as of May 1, 1931, fixed at a level lower than the properties were actually worth. There was no testimony indicating that either Mr. Jeffriess now deceased, or Mr. Wittenberg had any personal motive in doing other than arriving at a reasonable valuation of the properties of Consolidated and the subsidiaries.

The valuations of physical properties as fixed by the Jeffries-Wittenberg appraisal still showed a sufficient value to take care of the Bondholders of the Union Company and the Consumers Company, but the book value of the investment by the stockholders of Consolidated, which the evidence showed was originally in excess of \$7,000,000, was almost wiped out in its entirety by this latter appraisal.

TREATMENT OF BONDHOLDERS OF UNION COMPANY AND CONSUMERS COMPANY SUBSEQUENT TO CONSOLIDATION.

The evidence shows the interest paid by Consolidated upon Union bonds from the date of the consolidation to the time of the default aggregated \$603,240, and the interest paid by Consolidated upon the Consumers bonds from the date of the consolidation to the date of the default aggregated \$412,305.

The evidence shows that the Consolidated retired Union bonds from the date of the consolidation to the time of the default aggregating \$443,500 par value, and that Consolidated retired Consumers bonds from the date of the consolidation to the time of the default aggregating \$299,500.

The amount of the present bonded indebtedness of the Union and Consumers companies is as follows:

Union Company bonds outstanding \$1,979,500
Union bonds owned by Consolidated 102,500
Net Union bonds in the hands of the public 1,877,000
Consumers bonds outstanding 1,200,500
Consumers bonds owned by Consolidated 63,500
Net Consumers bonds in hands of the public 1,137,000

The evidence shows that although Consolidated paid in excess of \$1,000,000 in interest and retirement of Union bonds, and in excess of \$700,000 in interest and retirement of Consumers bonds, from 1929 to 1934, during that same period Consolidated showed a net loss during 1930,

1931, 1932 1933 and 1934 in excess of \$1,500,000. This net loss was arrived at after deducting depreciation, depletion, amortization on leases and taxes, principally on the valuations of 1929. The operating profit from 1929 to 1934, before bond interest and reserves for depreciation, depletion and amortization, aggregated approximately \$3,000,000. The major portion of this operating profit was made in 1929, 1930 and 1931. In 1934 the net operating profit was but \$21,420. The evidence shows that Consolidated during the depression used all available funds to pay interest on and to retire the Union and Consumers bonds.

As of September 30, 1937, the delinquent interest on the Union bonds held by the public aggregated \$459.865. and the delinquent interest on the Consumers bonds held by the public as of September 30, 1937, aggregated \$255,825. In addition to the delinquent interest on the Union and Consumers bonds, there were also substantial serial maturities and sinking fund payments due on the Union and Consumers bonds. The first interest default on the Union bonds was March 1, 1934, and has continued to date. The first interest default on the Consumers bonds was July 1, 1934, and has continued to date. The first default on the serial maturities of the Union bonds was September 1, 1933, and has continued to date, and the first default in the sinking fund payments on the Consumers bonds was July 1, 1934, and has continued to date.

The data respecting the delinquencies in bond interest and principal payments, as well as the payments made on bond interest and principal, are contained in a communication of November 26, 1937, from Robert Mitchell, Vice President of Consolidated, and were furnished at the request of the Special Master from the books and records

of the companies, and copies of this letter were mailed to the attorneys of all interested parties. No objection as to the accuracy of this information has been raised by any of said attorneys, and the Special Master therefore has accepted the data supplied by Mr. Mitchell as correct. Further data are contained in the letter of Mr. Mitchell of November 26, 1937, and a true copy of said communication is annexed to this Report and made a part hereof.

PLAN OF REORGANIZATION.

The Plan of Reorganization dated March 15, 1937, on file in the office of the United States Clerk of the above. entitled court was arrived at in the following manner: Upon the application of Consolidated to be given the benefits of the provisions of Section 77B of the Bankruptcy Act of 1898 as amended, the representatives of the bondholders of the Union Company and the Consumers Company and the representatives of the stockholders of Consolidated formed themselves into committees, each acting independently of the other. It was the conviction of the Union bondholders that the properties of the Union Company were the more valuable and desirable. The same contention as to their respective properties was made by the representatives of the Consumers bondholders and the representatives of the Consolidated stockholders. Each group believed that it had made the largest contribution to the assets and business of the consolidated companies and therefore was entitled to the most favorable treatment in the payment of the indebtedness represented by the bonds of the Union and Consumers companies and the stock of Consolidated. During the operations from 1929. to 1934 by Consolidated, the directors of Consolidated had deemed it expedient to center their major activities in the working and operation of the properties of the Con-

sumers Company, with the result that during the past several years the largest tonnage of production, and consequently the major portion of the total gross income, has been produced from the Consumers Company plants. In the event of a segregation of the properties, it would have been to the advantage of the Consumers Company bondholders to have the properties of the Consumers Company segregated from those of the Union Company, Reliance Company and Consolidated, because of the above facts. The Union Company still held the largest acreage in fee simple ownership as well as the larger number of bunkers. Consumers owned the smaller acreage in fee but the larger leasehold acreage. The respective committees representing the Union bondholders and the Consumers bondholders, and the Consolidated stockholders, were in every respect adverse and in many respects antagonistic in their respective interests. The evidence shows that it would be to the injury of all interested parties, including the bondholders and stockholders, if any attempt were made to segregate the properties and place them back in their original ownership, i. e., if the Union Company properties were to be returned to the Union Company, the Consumers Company properties to be returned to the Consumers Company, and the properties acquired by Consolidated to be segregated and retained by it. The evidence shows that there had been commingling of the various properties and assets, including rolling stock and other necessary equipment, during the period from 1929 to date! The operating revenue from the operations of the properties by Consolidated has been used upon all properties irrespective of the source from which it was produced. The funds secured by Consolidated from the sale of its stock and revenue acquired by Consolidated from operations of properties that Consolidated had acquired

subsequent to the consolidation have been used to further the business as a whole. All of these factors have made it practically impossible to effect a fair and equitable segregation of the properties. Added to this is the fact that the properties have for the past eight years been operated as if they were of one ownership. A going-business value and goodwill, resulting from such ownership and joint operation has been created. From the foregoing I must conclude that it would be highly injurious and destructive of the best interests of the bondholders and stockholders of the various companies to attempt to do other than agree upon a plan of reorganization of Consolidated giving full recognition, so far as the values of the properties are concerned, to the respective interests of the bondholders and stockholders. All parties without exception at the hearing agreed that they were opposed to foreclosure and liquidation. All parties, except the objectors, were of the conviction that the plan of reorganization was the most fair, equitable and feasible to all interests that could be arrived at. All parties represented at the hearing, including the objectors (except Mr. Rogers), were convinced that a plan of reorganization which contemplated the continuance of the operation of all of the properties as one unit under one management and ownership offered the greatest assurance to the bondholders of the Union Company and the Consumers Company that they would be paid an amount approximating the par value of their bonds. Of similar opinion were the representatives of Consolidated and its stockholders, viz., that a plan of reorganization that contemplated the operation of the properties under one ownership and as one unit would undoubtedly insure the preservation for the stockholders of the equity remaining after the bondholders had been paid as provided in the plan of reorganization.

SUBSEQUENT BETTERMENTS AND ADDITIONS
TO EQUIPMENT OF UNION COMPANY AND
CONSUMERS COMPANY.

The Trust Indentures of the Union Company and the Consumers Company, Special Master's Exhibits 12 and 13, provide in substance that all renewals, replacements, and substitutions, made subsequent to the dat of the Trust Indenture, of any equipment, fixtures, machinery, automobiles, trucks, road vehicles, steam shovels, implements, and appliances shall be subject to the lien of the The evidence shows that substantial Trust Indenture. sums were expended by Consolidated in the repair and maintenance of the properties of the Union Company, Consumers Company, and Reliance Company, and also that the trucks and automobiles and portions of the other equipment of the three above mentioned subsidiaries became unserviceable and worn out in the usual course of the operations in the carrying on of the business by Consolidated, and that equipment was purchased by Consolidated out of the funds and moneys of Consolidated to replace said worn out and unserviceable equipment and to purchase new and additional trucks and equipment and appliances. The evidence further shows that in some instances the trucks and automobiles which were worn out and unserviceable were turned in or delivered as a part payment on account of the new trucks and other equipment acquired by Consolidated; that such new and renewed equipment so purchased by Consolidated was necessary, proper, and essential to the carrying on of the business of Consolidated and its subsidiaries: that the funds with which said new and additional equipment was purchased and paid for were supplied by Consolidated from the usual operating revenues of the properties of the Union Company, Consumers Company, and Reliance Company, and also from the properties of Consolidated, and also from proceeds received by Consolidated from the sale of its stock to the public. The evidence further shows that there was such commingling of said funds last hereinabove referred to as to make it impracticable, from an accounting or other standpoint, to determine the amount of money from either or all of the respective sources which was used to replace, renew, or purchase additional trucks, automobiles, and other appliances and equipment used by Consolidated in and about the business. It is therefore found that, assuming that the lien of the Trust Indentures of the Union Company and the Consumers Company pursued and attached to such new, renewed, and additional equipment so as to subject said trucks, automobiles, appliances, and other equipment to the lien of said Trust Indenture and as security for the bonds issued thereunder, it is both impracticable and, from an accounting standpoint, impossible to determine to what extent the equipment now owned and operated by Consolidated is a renewal, replacement, or substitution of such automobiles, trucks, appliances, and other equipment of the Union Company, the Consumers Company, and the Reliance Conrpany, or is new equipment purchased by Consolidated for and on its own account from the proceeds resulting from the operation of the properties by Consolidated or from the funds received from the sale of Consolidated stock, and therefore not subject to the lien of said Trust Indentures, Special Master's Exhibits 12 and 13.

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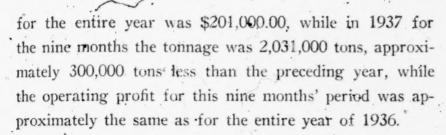
VALUE OF PROPERTIES

Testimony directed to the value of the properties of the Union Company, Consumers Company, Reliance Company, and Consolidated was given by Mr. Thomas C. Rogers. Mr. Robert Mitchell, Vice President of Consolidated, and Mr. Frank Gautier. Mr. Rogers is a man of long and wide experience in the rock, gravel, and sand business. Mr. Mitchell and Mr. Gautier likewise have had wide experience, covering a period of approximately fifteen years. Mr. Mitchell and Mr. Gautier were formerly with the subsidiaries (Union, Consumers, and Reliance Companies). prior to the merger in 1929. All three witnesses were thoroughly acquainted with the properties owned by all of the companies. While they differed as to the valuations in some details, on the whole the testimony of each of the witnesses showed that the value of the properties of the Union Company, Consumers Company, and Reliance Company was approximately \$3,300,000.00, and that, according to Mr. Mitchell's testimony, and including \$5.00,000.00 for good will and going business value, the total value of the properties of Consolidated would be approximately \$1,000,000.00, making a total valuation for the properties of Consolidated, Union, Consumers, and Reliance in excess of \$4,000,000.00. Mr. Rogers was of the opinion that the value of the Union properties would be \$7,000,000.00 if Union were operated as an independent unit. This valuation, however, was based upon the earnings that Mr. Rogers was convinced the Union properties would make in the event said properties were segregated and operated as an independent unit. evidence does not warrant a finding of this valuation. The evidence further shows that the success of this type of business depends not only upon tonnage sold, but also

upon prices received. The evidence further shows that there have been repeated price wars in the industry, and there there is no assurance of stability in market conditions. The following computations from the books and records of Consolidated clearly demonstrate this fact. In the first column is the year of the operation, in the second column tons of rock, gravel, and sand that were sold, and in the third column the operating profit before bond interest and reserves for depreciation, depletion, and amortization:

1.		2.		3.
Year	•	Tonnage Sold	O	perating Profit
1929		4,770,839.76		\$1,009,504.55
1930		4,049,672.91		649,778.19
1931		2,822,785.80		1,026,027.02
1932		2,480,799.55	* •	73,848.70
1933		1,974,109.22		230,309.33
1934		874,334.99		21,420.90
1935	0 . (1,111,617.34		49,092.51
1936		2,300,258.97		201,632.29.
1937	(first 9 mos.)	2,031,290.37		199,890.82
		22,415,709.61		\$3,461,504.31

A comparison of the years of 1930 and 1931 and again of the years of 1936 and 1937 demonstrates the extent to which prices for the product affect the earnings of the business. In 1930 there were sold in excess of 4,000,000 tons and the operating profit was \$649,000.00. In 1931 there were sold 2,822,000 tons and the operating profit was \$1,026,000.00. This demonstrated that with a decrease in tonnage of 1,200,000 tons, there was an increase in operating profit of nearly \$400,000.00. In 1936 the tonnage was 2,300,000 tons and the operating profit



The evidence shows that the assets of the Union Company, Consumers Company, Reliance Company, and Consolidated are entirely insufficient and inadequate to pay the face value of the bonds, plus all accrued interest and the liquidation preferences, plus accrued dividends upon the preferred stock of Consolidated. The evidence . 4rther shows that the value of the assets, admittedly subiect to the Trust Indentures of the Union Company and the Consumers Company, is insufficient to pay the par value of the bonds, plus accrued interest secured by said Trust Indenture, and it is to the interest and advantage of the bondholders that the properties of the Union Company, Consumers Company, Reliance Company, together with the properties of Consolidated, be operated and owned as one unit, and that by being so operated and owned the said bondholders would receive a larger yield and return both in principal and interest upon their bonds than would be the case in the event of a foreclosure or bankruptcy or other liquidation, or a segregation of the properties so as to return them again to their owners and have them . operated as separate, independent, and competing units. The evidence does show, however, that the fair present going-concern value of all of the properties, if operated as a unit, is in excess of the total bonded indebtedness, plus accrued and unpaid interest thereon up to April 1, 1937, the latter being the date of the new bonds to be issued under the plan of reorganization.

A

PLAN IS FAIR AND HAS BEEN APPROVED BY REQUIRED PERCENTAGE OF BONDHOLD ERS AND STOCKHOLDERS.

The plan of reorganization has taken into consideration all of the foregoing facts and other matters. The plan represents a fair compromise between the various conflicting interests, that is, the interest of the Union bondholders, the Consumers bondholders, and the stockholders. both common and preferred, of Consolidated, the debtor. The compromise was arrived at as the result of extensive and painstaking negotiations, including amongst all the other factors a fair and reasonable balancing of the greater book values of the Union properties against the greater yield in late years from the Consumers properties. The plan, when all of the facts and factors are considered, was arrived at after an honest effort to effect an equitable and fair adjustment of the respective interests of all conflicting groups, and the evidence demonstrates and shows, and the findings are made: (a) that the plan of reorganization dated March 15, 1937, is fair and equitable, and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (b) said plan complies with the provisions of subdivision (b) of Section 77B of the Bankruptcy Act; (c) said plan has been caccepted as required by the provisions of subdivision (e), clause (1), of said Section 77B; (d) the provisions of subdivision (e), clause (2), of said Section 77B have been complied with to the extent applicable, and that neither the Debtor nor any of its subsidiaries are a utility, and consequently compliance with said subdivision (e) of said clause (2) is not required; (e) said plan provides that all amounts to be paid by the Debtor or by the new corporation to be organized pursuant to said plan to acquire the Debtor's assets, and all amounts to be paid to committees or reorganization managers for services or expenses incidental to the reorganization, are to be subject to the approval of the judge; and (f) the offer of said plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act.

It is further found that the submission of the said plan to the bondholders of the Union Company and the Consumers Company and to the stockholders of Consolidated was done fairly and openly and in no way the result of any misrepresentation or other inequitable practice, and that the consent of the bondholders and stockholders was given with all of the facts freely and fairly placed before them.

The evidence shows that 77.26% of the bondholders of the Consumers Company have given their approval to the plan of reorganization. By adding the consent of the Consumers bonds owned by Consolidated, the percentage of consenting Consumers bonds would be 78.47%. evidence shows that 67.61% of the Union bondholders have given their consent to the plan of reorganization and that if the Union bonds owned by Consolidated were included, there would have been 69.29% approving the plan of reorganization. The evidence shows that Consolidated 'had purchased Union bonds and Consumers bonds and owned said bonds and was authorized by the directors of Consolidated to consent to the plan of reorganization; that said ownership by Consolidated of said Union bonds and Consumers bonds qualified and entitled Consolidated to express its approval or disapproval of the plan of reorganization.

The evidence shows that the holders of 62.08% of the preferred stock of Consolidated have expressed their approval of the plan of reorganization, and that the holders of 50.10% of the common stock of Consolidated have given their approval and consent to the plan of reorganization. It is further found that said approval and consent of said bondholders and stockholders were in the manner and form required and authorized by Section 77B of the Bankruptcy Act.

The plan of reorganization gives recognition to the rights and interests of the stockholders of Consolidated. It is found that the Consolidated stockholders have substantial equities in the properties included in the plan of reorganization, and that the interests and rights granted said stockholders under the plan of reorganization are not out of proportion to the equities of said stockholders, considering their contribution to the existing properties now represented by the consolidated companies and that the plan of reorganization is fair, just and equitable with respect to the rights of said stockholders.

FINDINGS WITH RESPECT TO THE OBJECTIONS OF OBJECTOR E. BLOIS DUBOIS, HEREIN-AFTER REFERRED TO AS MR. DUBOIS.

Mr. duBois is the owner of \$150,000 par value of Union bonds and the owner of \$31,500 par value of Consumers bonds. Mr. duBois purchased all of the Consumers bonds between July 1, 1934, and April 17, 1935, and prior to the filing of any petition for reorganization of Consolidated under Section 77B of the Bankruptcy Act. Said Consumers bonds owned by Mr. duBois were pur-

chased subsequent to the default in payment of interest by the Consumers Company on said bonds. Mr. duBois purchased \$72,000 par value of Union bonds from time to time between September 20, 1934, and May 8, 1935, and prior to the filing of any petition by Consolidated under Section 77B. Said purchase of Union bonds by Mr. du-Bois was made, however, after there had been default in payment of interest upon Union bonds and subsequent to a default by the Union Company in meeting certain serial maturities. Mr. MuBois purchased \$78,000 par value of Union bonds between June 5, 1935, and December 9, 1935, being subsequent to the filing of the petition for reorganization by Consolidated under Section 77B. Mr. duBois did not attend the hearings, it being stated by his counsel that he was ill. A stipulation (Special Master's Exhibit No. 10) was filed setting forth the facts to which Mr. duBois would testify, subject to legal objections, if he were present at said hearing. The evidence further shows that Mr. duBois paid on an average of \$210 for each bond of Consumers Company, par value \$1,000, and that he paid \$145 for each Union Company bond, par value \$1,000; that of the total of \$31,500 par value in Consumers bonds purchased by Mr. duBois, he has an actual cash investment of approximately \$6,600, and that he has actual cash investment of approximately \$21,700 in the \$150,000 par value of Union bonds.

Mr. duBois would testify, according to the stipulation, that he made the purchase of said bonds after careful inquiry and with the full belief and conviction that a building boom would soon occur in Southern California, and that said purchase was not for purposes of speculation or for the purpose of attempting to take advantage of market fluctuations.

The main and principal objection of Mr. duBois to the plan of reorganization may be summarized as follows: That the stockholders of Consolidated have no equity in or to the properties represented by the plan of reorganization, and that said stockholders should not be given any right or interest under said plan, and that the entire properties of the Union Company, Reliance Company, Consumers Company and of Consolidated, including all of the equipment, trucks, automobiles and appliances, be available for sole benefit of the bondholders . I the Union Company and Consumers Company. The evidence shows that the objection of Mr. duBois is without merit or support. The other objections of Mr. duBois, as presented in his written objections and at the hearing, have been covered by other portions of these Findings and are likewise without merit or support.

INDEPENDENT APPRAISAL.

The plan of reorganization, as heretofore found, is the result of nearly two years of conscientious effort of opposing and conflicting interests. The evidence developed that there has been such a commingling of the assets and properties, including the funds from the sale of stock of Consolidated, that an appraisal of the properties would be of no value to the court and would be of such indefinite and unsatisfactory nature as to produce further confusion, and a separate, independent appraisal would result in unnecessary and great delay and expense to all parties. benefits would be highly problematical. There is no evidence that the plan of reorganization has dealt unfairly . or inequitably with the bondholders of the Union and Consumers companies or the stockholders of Consolidated. All interests are unanimous in their conviction that none of the interests are receiving as much as they are entitled

to. The evidence shows, however, that the division of the respective interests in the plan of reorganization not only presents a feasible and workable plan, but likewise has taken into consideration all of the claims, equities and rights of the bondholders and stockholders and has arrived at a plan which gives full recognition to the rights and equities of each class.

BASIS OF REPORT.

This Report, and the findings and conclusions herein made and reached, are based upon (a) the testimony produced at the hearing before the Special Master, (b) all exhibits introduced at said hearing, and (c) all of the documents, proceedings and records filed in the above entitled cause in the office of the Clerk of the court. The Special Master will certify the reporter's transcript of said hearing before the Special Master as soon as such transcript has been prepared at the instance of objector duBois, without expense to the Debtors or their estates, and submitted to the Special Master for examination and certification.

CONCLUSION.

For the reasons herein stated, it is recommended that the Plan of Reorganization of March 15, 1937, be confirmed.

Dated: February 11th, 1938.

Frank P Doherty (Frank P. Doherty) Special Master.'

OPERATING AGREEMENT

AGREEMENT, made and entered into in quadruplicate original this 15th day of July, 1929, by and between CONSOLIDATED ROCK PRODUCTS CO., a corporation duly organized and existing under the laws of the State of Delaware, party of the one part, hereinafter called "Operating Company", and UNION ROCK COM-PANY, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Union Company", CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation duly organized and existing under the laws of the State of Delaware; hereinafter called "Consumers Company", and RELIANCE ROCK COMPANY, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Reliance Company", parties of the other part, for convenience referred to hereinafter collectively as "Owning Companies"; all of the parties hereto being duly organized to do and doing business in the State of California.

THIS INDENTURE, WITNESSETH:

Recitals

The Union Company is the owner of all of the outstanding capital stock of the Reliance Company, with the exception of qualifying shares of directors; and the Operating Company is the owner of all outstanding capital stock of the Union Company and the Consumers Company; with the exception of qualifying shares of directors.

The Union Company entered into a certain Trust Indenture dated the 1st day of September, 1927, with Title Insurance and Trust Company, a corporation duly organized and existing under the laws of the State of California,

as Trustee, to secure a bond issue in a total authorized principal amount of Five Million Dollars (\$5,000,000.00) par value, of which issue bonds in the principal amount of Two Milion; Four Hundred Twenty Three Thousand Dollars (\$2,423,000.00) par value are outstanding; and the Consumers Company entered into a certain Trust Indenture dated the 1st day of July, 1928, with Bank of Italy National Trust & Savings Association, a banking association organized and existing under and by virtue of the laws of the United States of America, as trustee, to secure a bond issue in a total authorized principal amount of Two Million, Five Hundred Thousand Dollars (\$2,-500,00000) par value, of which issue bonds in the principal amount of One Million, Five Hundred Thousand Dollars (\$1,500,000.00) par value are outstanding. Each of said trust indentures are duly recorded and registered as required by law and reference to them is hereby made for detailed provisions thereof.

Under the circumstances, the maintenance by each of the Owning Companies of separate and distinct operating organizations is not consistent with efficient and economical management; and results in duplicated production, transportation and sales expense, with attendant increased costs to the purchasing public of rock and rock products. Therefore, in the public interest as well as in the interests of the parties hereto, it is proposed that the Operating Company, subject to the provisions of the Trust Indentures above referred to, maintain and operate the properties of the Owning Companies as hereinafter more particularly referred to under one operating organization. The economies thereof will result in material savings to the purchasing public of rock and rock products, will permit of reasonable returns from operation of the business, and

will result in the maintenance of competition with other rock companies operating in this territory, upon a fair and wholesome basis.

An agreement between the parties hereto has been reached as hereafter stated.

Agreement

NOW, THEREFORE, IT IS MUTUALLY UNDER-STOOD AND AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. Section 1. Effective Date.

The effective date of this agreement shall be the 1st day of April 1929, and this agreement shall be deemed as having been entered into on and as of said date.

Section 2. Properties of the respective owning Com-

- (a) Properties of the Union Company subjected to the provisions of this agreement shall be:
- 1. Those particularly described or referred to in and subjected to the provisions of said Trust Indenture dated the 1st day of September, 1927, (paragraphs I to IX, inclusive, pages 11 to 70, inclusive, of printed copy of said Trust Indenture), including also
- 2. Cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of materials (all of which referred to in this subdivision (2) of Paragraph (a) of Section 2 shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating

Company), but expressly excepting and excluding any contracts for the purchase of materials or supplies unless the Operating Company shall elect to accept the same by written notice unto the Union Company and the other party or parties to any such transaction.

- (b) Properties of the Consumers Company subjected to the provisions of this agreement shall be:
- 1. Those particularly described or referred to in and subjected to the provisions of said Trust Indenture dated the 1st day of July, 1928, pages 7 to 23, inclusive, of printed copy of said Trust Indenture), including also
- 2. Cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand, and contracts for the sale of materials (all of which referred to in this subdivision (2) of Paragraph (b) of Section 2 shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company), but expressly excepting and excluding any contracts for the purchase of materials or supplies unless the Operating Company shall elect to accept the same by written notice unto the Consumers Company and the other party or parties to any such transaction.
- (c) Properties of the Reliance Company subjected to the provisions of this agreement shall be (except as in this paragraph (c) expressly excepted and excluded) all of its property real and personal and wheresoever situate. It is understood that all cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials, and materials in process, raw materials not in place, supplies actually on hand, and contracts for the

sale of materials shall be assigned and transferred, and for the purposes hereof shall be deemed to have been assigned and transferred unto the Operating Company, notwithstanding anything to the contrary herein, any contracts for the purchase of materials or supplies are expressly excepted and excluded herefrom unless the Operating Company shall elect to accept the same by written notice unto the Reliance Company and the other party or parties to any such transaction.

The term "properties" as hereafter used shall be deemed to mean and include the properties of the respective Owning Companies as next hereinabove referred to.

Section 3. Ownership.

It is understood and agreed, notwithstanding anything to the contrary herein contained, that the ownership of said properties (other than cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials, which are subject to transfer and assignment as herein provided), shall be and remain in the Owning Companies respectively, subject, however, to the provisions of the Trust Indentures above referred to; and that the Operating Company shall have no estate therein nor no rights therein or thereto except as herein provided. It is further understood and agreed that the provisions hereof are and at all times shall be subordinate and subject to the provisions of said Trust Indentures.

Section 4. Operation of Properties by Operating Company.

- (a) For the purposes of maintenance and operation thereof, and the production, transportation and sale of rock and rock products therefrom, (1) the Owning Companies, subject to the provisions of the Trust Indentures above referred to, hereby vest in the Operating Company for the term hereof the possession and custody of their properties above referred to the ownership of which is retained by the Owning Companies, and (2) the Owning Companies hereby assign and transfer unto Operating Company all of their cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place supplies actually on hand and contracts for the sale of materials, and agree to furnish such other and further documents as the Operating Company may require to effectuate such assignment and transfer. The Operating Company hereby accepts said assignment and transfer and the possession and custody of the properties above referred to for the purposes herein stated; it being mutually understood, however, that the same shall be subject to . the further terms and conditions hereafter set forth in this agreement.
- (b) The Operating Company hereby agrees to furnish a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owning Companies, and to operate such properties for the term hereof; provided, however, that the Operating Company may at its option (conditional, however, upon the preservation in the Owning Companies, of their present leasehold rights) discontinue for such time as the Operat-

ing Company may deem desirable the actual physical operation of any part or parts of said properties if the same is not consistent with the efficient and economical management of all of said properties considered as a whole.

- (c) The Owning Companies hereby grant unto the Operating Company the right to use their properties for advertising purposes, including uniform painting of motor trucks and other vehicles.
- (d) The Operating Company shall furnish at its own expense all materials and supplies, and all labor and superintendence, for the maintenance and operation of the properties of the Owning Companies.

Section 5. Maintenance and Upkeep.

The Operating Company shall maintain and keep in first-class operating condition all buildings, structures and equipment of every sort and nature of the Owning Companies subject to the provisions of this agreement; provided, however, that upon the termination of this agreement howsoever the Operating Company shall not be liable unto the Owning Companies to do more than to return to them their respective properties in substantially the same condition as when received by the Operating Company, appropriate allowance being made for any deferred maintenance existing at the effective date of this agreement as compared to that existing when said properties are returned, as well as items of depreciation, depletion, amortization and obsolescence hereafter referred to. The Operating Company shall be at liberty to make such additions to, betterments of, and improvements in the respective properties during the term hereof as in its

judgment may seem desirable in connection with efficient operation of the business, and to carry out such retirements and/or replacements as in its judgment are necessary to accomplish the same purpose, the costs of which additions, betterments, improvements and replacements shall be paid by the Operating Company and charged to the current account of the Owning Company or Companies involved.

Section 6. Accounting Methods.

The Operating Company agrees to keep and maintain such books and accounts for each of the Owning Companies in accordance with such modern and approved accounting methods as will comply with the requirements of the Trust Indentures above referred to, recording therein proper entries affecting depreciation, depletion, amortizatiton and obsolescence of each of said properties as well as entries recording the transactions between the parties hereto, and other matters properly and customarily stated in books of account in recording transactions and evidencing the results thereof. The accounting methods to be used by the Operating Company pursuant to the provisions of this section shall be subject to the approval of Haskins & Sells, or other duly certified public accountants satisfactory to the Operating Company and each of the Owning Companies as to their respective properties.

Section 7. Compliance by Owning Companies with pro-

The Operating Company hereby undertakes and agrees to pay unto the Union Company and unto the Consumers Company such amounts from time to time as will, enable them punctually to carry out and perform all pro-

visions of said Trust Indentures relating to payment of bond interest and provisions relating to sinking funds; and the Operating Company agrees as the agent of the Union Company to carry out and perform in so far as it lawfully may the particular covenants of the Union Company as contained in Article III, Section 3 and 4, Sections 7 to 10, inclusive, the last sentence of the first paragraph of Section ii, Sections 46 to 19, inclusive, and Section 21 of said Trust Indenture of September 1, 1927, and the Operating Company further agrees as the agent of the Consumers Company to carry out and perform in so far as it lawfullly may the particular covenants of the Consumers Company as contained in Article III, Section 3, Sections 6 to 9, inclusive, the last sentence of the first paragraph of Section 10, Sections 15 to 17, inclusive, and Section 19 of said Trust Indenture of July 1, 1928; and as the agent of the Reliance Company the Operating Company shall in so far as it lawfully may carry out and perform the same duties and obligations with respect to the Reliance Company in so far as the same, irrespective of Trust Indenture, may be applicable thereto, including payment of all taxes, charges and assessments of every sort and nature; but with the further understanding that the Operating Company shall be privileged under the provisions of the law of the United States as it is or hereafter may be to file consolidated income tax returns and to pay the same upon behalf of all the parties to this agreement. All funds in connection with performance by the Operating Company of its obligations in this section stated shall be furnished and paid by the Operating Company, but all payments made by the Operating Company with respect to sinking funds for redemption of bonds shall be charged to the current accounts of the Union Company and the Consumers Company, respectively.

Section 8. Claims and Suits.

The Operating Company hereby undertakes and agrees (1) to indemnify the Owning Companies against and to hold them and all of them harmless from all claims, demands, actions, causes of action, judgments and awards of every sort and nature by reason of injury to or death of persons or loss of or damage to property caused by or arising from, either directly or indirectly, the operations of the Operating Company hereunder; and (2) upon behalf of the Owning Companies respectively to defend and/or settle and pay any claims or suits against any of the Owning Companies existing and of which the Operating Company had knowledge on the effective date of this agreement, but expressly excepting and excluding any claims or suits against any of said Owning Companies not a matter of record upon the books of the Owning Companies upon said date and unknown to the Operating Company, and further expressly excepting and excluding any claims or suits based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All amounts, including costs and expenses incident to matters covered by this subdivision (2) of this section paid by the Operating Company shall be deemed paid by it as agent and upon behalf of the Owning Companies, respectively, and such payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties.

Section 9. Assumption by the Operating Company of Liabilities.

The Operating Company hereby assumes and agrees to pay on behalf of the Owning Companies all notes, bills and accounts payable appearing upon the books or records of the Owning Companies on the effective date of this . agreement and any other bills payable not so appearing, but of which the Operating Company had notice on or prior to said date; provided, however, that the Operating Company shall be privileged to defend the same or any thereof if illegal, unjust or otherwise inequitable or unfair, and provided further that the Operating Company does not assume or agree to pay any notes, bills or accounts payable based upon or growing out of any contracts for the purchase of materials or supplies unless the Operating Company shall have elected to accept the same as hereinabove provided. All payments made by the Operating Company pursuant to the provisions of this section shall be deemed paid by it as agent and upon behalf of the Owning Companies, respectively, and such . payments shall thereupon be taken into the accounts of the parties and shall reflect themselves in the current accounts of said parties.

Section 10. Operating Expenses and Revenues.

The Operating Company hereby undertakes and agrees to bear and pay the following operating expenses, namely:

(a) all maintenances and operating expense of the properties herein referred to during the term hereof, including that of its own operating organization which shall act solely and exclusively in the premises, (b) all expense incident to the maintenance of the corporate expense of

the respective parties hereto, (c) amounts equivalent to installments of interest on funded debt as required by said Trust Indentures (as hereinabove in Section 7 referred to, wherein provision is also made for payment by the Operating Company of such amounts from time to time as will enable the Union Company and the Consumers Company to carry out and perform all provisions of said Trust Indentures relating to sinking funds for redemption of bonds), (d) all taxes, state and Federal (for the purposes hereof deemed operating expense), and (e) all other operating charges and expenses of the Owning Companies of every sort and nature, including items of depreciation, depletion, amortization and obsolescence, which items (not involving a cash outlay) shall be credited to the current account of the Owning Companies and shall be paid to said Owning Companies as and when provided in Section 14, hereof, and in considerations thereof the Operating Company shall be and it is hereby authorized to retain for its own use and benefit all net revenues from the operation of said properties.

Section 11. Compensation.

Since the Operating Company herein covenants and agrees to furnish the Owning Companies with a complete operating organization with facilities for the efficient and economical production, transportation and sale of rock and rock products from the properties of the Owning Companies, thus relieving the Owning Companies of the burden of maintaining separate and distinct operating organizations, and since under the provisions hereof the

Operating Company covenants and agrees to pay the amount of all fixed charges and all other expenses of the Owning Companies and to protect them and each of them against any operating deficit, it is distinctly understood and agreed that the covenants of the Operating Company herein contained shall be and they are full and adequate consideration for the covenants of the Owning Companies herein set forth.

Section 12. Option to Purchase.

Each of the Owning Companies bereby grants unto the Operating Company throughout the term hereof the option to purchase its properties the ownership of which is retained pursuant to the provisions of Section 3 hereof, in consideration of payment of a sum of money equivalent to the appraised value of said properties as determined by a board of three appraisers, one to be appointed by the Operating Company, one by the Owning Company involved, and the third by the two appraisers so appointed, provided, however, that with respect to the properties of the Union Company and the Consumers Company the price to be paid shall not in any event be less than the redemption price of all then outstanding bonds, plus accrued interest.

Should the Operating Company consider the advisability of the purchase of the properties of any of the Owning Companies it may require the appraisement above referred to by written demand therefor, naming its appraiser. Within thirty (30) days after receipt of such demand the Owning Company shall name its appraiser and notify

the Operating Company in Writing thereof, but if within said period the Owning Company shall not have chosen its appraiser and notified the Operating Company in writing thereof, the Operating Company shall have the right to name the Owning Company's appraises, the Owning Company to be notified in writing thereof. The two so appointed shall appoint the third appraiser. Should the board of three appraisers be unable to agree as to the value of said properties, they shall call in two additional appraisers and the decision of the majority of said board of five shall be deemed the value of said properties. The Operating Company shall have thirty days after receipt of the written return of said appraisers within which to elect to exercise said option. Exercise of said option shall be by notice in writing. All costs of appraisement shall be borne and paid by the Operating Company.

Section 13. Term.

Unless earlier terminated by mutual consent of all parties hereto, this agreement shall remain in effect until terminated by thirty (30) days written notice by all of the Owning Companies unto the Operating Company, or conversely by thirty (30) days written notice from the Operating Company unto all of the Owning Companies; it being further provided in this connection that should any one or more of the Owning Companies wish to withdraw herefrom during the term hereof it or they shall have the privileges of so doing upon giving the notice hereinabove mentioned, and conversely should the Operating Company desire at any time during the term hereof

to discontinue operation of any one or more of said properties it may do so by such thirty (30) days notice to the owner or owners of said property or properties.

Section 14. Final Accounting.

Upon termination of this agreement as to any one or more of said Owning Companies the possession and custody of the properties of such company or companies the ownership of which is retained pursuant to the provisions of Section 3 hereof shall be revested by the Operating Company in the owner or owners thereof, and in that event a financial adjustment shall be made as between the Operating Company and any such Owning Company or Companies, in accordance with the current account of the parties on date of return of said properties; and payment shall thereupon be made in accordance therewith.

Section 15. Successors and Assigns.

This agreement shall be binding upon the respective successors and assigns of the parties hereto; provided, however, that the Operating Company shall not assign this agreement or any right or privilege herein conferred without the written consent of the Owning Companies then party hereto.

Section 16. Benefits of this Agreement.

It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for the benefit of any third person as that term is used in Section 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereof.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed upon their behalf by their respective officers thereunto duly authorized, and their respective corporate seals hereunto affixed, as of the date herein first written.

Attest:

John D. Gregg

Secretary

CONSOLIDATED ROCK

PRODUCTS CO.,

By B. F. Nysewander, Jr.

Its Vice-President..

Attest:

UNION ROCK COMPANY

Robert Mitchell

Secretary

By S. W. Burford

Its President

Attest:

CONSUMERS ROCK &

Robt. Mitchell

GRAVEL COMPANY, INC.,

Secretary

By S. W. Burford

Its President.

Attest:

RELIANCE ROCK COMPANY,

Robt. Mitchell

By S. W. Burford

Secretary

Its President

Approved as to form
Bauer, Wright & McDonald

by Pettit

MODIFICATION OF OPERATING AGREEMENT

This agreement made and entered into in quadruplicate original this 16th day of February, 1933, by and between

CONSOLIDATED ROCK PRODUCTS Co., a corporation duly organized and existing under the laws of the State of Delaware, party of the one part, hereinafter called "Operating Company", and

UNION ROCK COMPANY, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Union Company", and

CONSUMERS ROCK AND GRAVEL COMPANY, INC., a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Consumers Company", and

RELIANCE ROCK COMPANY, a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called "Reliance Company", parties of the other part, for convenience referred to hereinafter collectively as "Owning Companies"; all of the parties hereto being duly authorized to do and doing business in the State of California.

WITNESSETH:

THAT WHEREAS the parties hereto, under date of July 15, 1929 but effective as of April 1, 1929, entered into a certain agreement, designated "Operating Agreement", setting forth the mutual obligations of the parties hereto, concerning operation by operating company of the properties of Owning Companies, and

WHEREAS under said agreement it was provided that Operating Company was to be charged with depreciation, amortization, depletion and obsolescence, hereinafter referred to as "depreciation", on the properties of the Owning Companies, without setting forth the basis therefor, and whereas depreciation has been set up by the accountants based on the then book value of Owning Companies' properties, and

WHEREAS it appears to Operating Company and. Owning Companies that the depreciation on said basis was and is unfair, inequitable and actually not contemplated by the parties at the time the agreement was entered into, and

WHEREAS said agreement contains no default provision and it is believed that one should be set forth, and

WHEREAS, pursuant to said agreement it was provided that any party thereto could terminate said operating agreement as to its particular property upon thirty days' written notice of its intention so to do, and

WHEREAS Operating Company is unwilling to proceed further under said operating agreement unless it is revised and changed both as to said depreciation and as to said termination, and

WHEREAS it is deemed not only extremely desirable and advantageous to Owning Companies that said operating agreement continue, but is also deemed fair and equitable and in accordance with what should have been the original agreement of the parties hereto, that said depreciation be adjusted along the lines hereinafter set forth and that said agreement be for a fixed period terminable prior thereto only with the written consent of Operating Company and any two of Owning Companies, so that no one of Owning Companies, nor Operating Company, can

withdraw from said operating agreement and thereby actually destroy the purpose thereof, and

WHEREAS Operating Company is willing as a part of the consideration for the execution of this agreement to forego and cancel its option to purchase the property of Owning Companies set forth in Section 12 of the above mentioned operating agreement,

NOW THEREFORE, for and in consideration of the sum of Ten Dollar's (\$10.00) and other good and valuable consideration in hand paid by Operating Company to each of Owning Companies, receipt of which is hereby respectively acknowledged, and also in consideration of the covenants and agreements herein contained, it is mutually understood and agreed that said operating agreement is hereby modified in the following manner, to-wit:

- 1. That the option to purchase set forth in Section 12 is hereby eliminated and cancelled.
- 2. That anything in said operating agreement contained to the contrary notwithstanding—and regardless of how said item may be absorbed or set up by the individual Owning Companies—the "depreciation" to be credited to the Owning Companies' account by the Operating Company shall actually be credited only upon the termination of the agreement and that at said time it shall be arrived at upon the following basis: The Operating Company and each Owning Company shall within five days after such termination appoint one appraiser. Within five days thereafter the appraiser of the Operating Company with the appraiser from each respective Owning Company shall appoint a third appraiser. Within ninety

days after the appraisers are so appointed, they shall as to the respective properties ascertain the amount of the depreciation which should be credited to the respective Owning Companies for the period of the agreement, starting April 1; 1929 and ending with the date of termination. Such depreciation shall be based upon the appraised. actual values of said properties, regardless of book values, starting April 1, 1929 and reappraised as of the first day of April of each year thereafter. The basis of depreciation shall also be determined by said appraisers in such report and shall be such basis as is usual and customary in said business-taking into consideration the use made thereof by Operating Company-and fair and equitable to the Operating Company and the respective Owning Companies. The figures so arrived at shall be the amount to be credited to the account of the Owning Companies respectively, and settlement between the Operating Company and the respective Owning Companies shall be made within ten days after the completion of said appraisal in accordance with the current account of the parties on said date. It is specifically understood and agreed, however, that in the financial adjustment and payment between the Operating and Owning Companies, as herein and in said-Operating Agreement specified, the portion of such adjustment represented by "depreciation", determined as aforesaid, may be paid by Operating Company to the respective Owning Companies in cash, or at Operating Company's option may, with a 5% penalty added thereto, be paid 25% in ten equal annual installments and the entire balance at the end of the tenth year. Said installments shall be evidenced by separate promissory notes bearing interest at the rate of 5% per annum, payable at maturity.

The Operating Company may appoint one appraiser for appraisal of all of the Owning Companies' properties, or may appoint one for each of them, or make such appointments in any manner it sees fit. Owning Companies may each appoint separate appraisers or may jointly appoint one appraiser for all their properties. In any event, however, the appraisals shall be separate as to each Owning Company. The expense of the appraisals shall be borne one-half by the Operating Company and one-half by the respective Owning Companies, or the respective Owning Companies may together pay their proportions of one-half if only one appraiser is appointed by them jointly.

Should either of the parties hereto fail to appoint its appraiser within the time herein named, or should the two so appointed fail to appoint a third within the stated period, then either party not in default in such appointment may make application to the presiding Judge of the Superior Court of Los Angeles County for such appointment, and any appraiser or appraisers so appointed shall have like powers to those which would have vested in an appraiser had he been appointed as hereinabove set forth.

3. That in lieu of the term specified in Section 13 of said operating agreement, the term shall be five years from the date hereof, subject, however, to termination prior thereto in the event of default as hereinafter specified or by written consent to earlier termination by any two of Owning Companies and Operating Company. Operating Company is hereby given the or con to extend said operating agreement as hereby modified for a further

term of five ears upon the same terms and conditions, provided that rotice of its intention to extend said term is given to each of owning companies within one year of the date of expiration of the original term in this paragraph specified.

4. In the event of default under said operating agreement on the part of Operating Company, any one of Owning Companies as to which a default exists may give Operating Company sixty days' written notice specifying such default, and should the default so specified be not cured within said period, then this agreement may therewoon be terminated by such Owning Company as to its properties.

In the event of default, hereunder by any Owning Company and failure to cure such default within sixty days after written notice thereof is given by Operating Company to such Owning Company, then Operating Company may terminate this agreement as to such Owning Company:

In the event that any Owning Company goes into default and said agreement is terminated as to it by Operating Company as hereinabove specified, or in the event any Owning Company withdraws the whole or any part of its properties from Operating Company for any reason other than default on the part of Operating Company and termination thereby, or termination of this agreement by written consent as hereinabove specified, then such Owning Company shall forfeit its right to a settlement with Operating Company for any item of depreciation to which

it would have been entitled had the agreement been per-

Except as herein specifically modified the aforesaid operating agreement is and shall be deemed to be in full force and effect in all of its terms and conditions, it being specifically understood and agreed, however, that in case of conflict between said operating agreement and this modification agreement, this agreement shall govern.

This agreement shall inure to the benefit of and be binding upon the respective successors and assigns of each of the parties hereto.

IN WKINESS WHEREOF the parties hereto have caused this agreement to be executed by their respective officers thereunto duly authorized, and their corporate seals to be hereunto affixed, the day and year first above written.

CONSOLIDATED ROCK PRODUCTS CO.,
By F. J. TWAITS, President
By ROBERT MITCHELL, Secretary

UNION ROCK COMPANY

By F. J. TWAITS, President

By ROBERT MITCHELL, Secretary

CONSUMERS ROCK AND GRAVEL COMPANY; INC. /

By F. J. TWAITS, President
By ROBERT MITCHELL, Secretary.

By F. J. TWAITS, President

By ROBERT MITCHELL, Secretary

CONSOLIDATED ROCK PRODUCTS CO.

Los Angeles, Calif.

Telephone ADams 3111 General Offices
2730 South Alameda Street

November 26th 1937.

Mr. Frank P. Doherty
515-519 Title Insurance Building
433 South Spring Street
Los Angeles; California

Dear Mr. Doherty:

Replying to your letter of November 23rd, 1937:

- 1. Amount of outstanding preferred stock—285,947 shares—carried on the balance sheet at stated value of \$1,800,000.00
- 2. Amount of common stock issued and outstanding 397,455 shares,—carried on the balance sheet at stated value of \$1.00.
- 3. Amount of Union Rock Company bonds issued and outstanding as of April 1st, 1929— \$2,423,000.00 Owned by Union Rock Company 35,000.00

Net in hands of public

\$2,388,000.00

4. Amount of Consumers Rock and Gravel Company Inc. bonds issued and outstanding as of April 1st, 1929—
\$1,500,000.00

Owned by Consumers Rock & Gravel Co.,

Inc.,

8,000.00

Net in hands of public

\$1,492,000.00

In consideration of items 5, 6, 7, and 8, will show separate schedules for each separate item but call attention to provisions of trust indentures regarding sinking fund deposits:

a. Union Rock Company trust indenture provides that so long as bonds are outstanding, the company shall deposit with the trustee on or before February 25th of each year the sum of \$80,000.00, and on August 25th of each year the sum of \$140,000.00, such sums to be placed in sinking fund to be used:

first to pay semi-annual bond interest

second to pay bonds due on the next succeeding serial maturity date.

third to retire bonds either by purchase from the company, or in the open market, or call by lot.

Interest on the Union Rock Company bonds is due on March 1st and September 1st of each year, and the principal amount of \$60,000.00 par value of bonds mature serially September 1st of each year.

Mr. Frank P. Doherty -2- November 26, 1937.

b. Consumers Rock & Gravel Company Inc., trust indenture provides payment to the trustee on or before June 25th of each year of the sum of \$45,000.00, and on or

before December 26th of each year the sum of \$87,500.00 to be applied:

first to the payment of bond interest, and

second to the retirement of outstanding bonds either by purchase from the company, or in the open market, or call by lot.

The Consumers trust indenture has a further provision allowing the company to deposit bonds at par in lieu of money in the making of payments into the sinking fund so that the actual cash obligation of the sinking fund provisions in the case of the Consumers issue, is to the extent of cash required for interest, plus amount necessary to purchase sufficient bonds in the market to make up the aggregate of requirements. Interest on Consumers bonds is due on January 1st and July 1st of each year.

5. Interest paid by Consolidated Rock Products Co. for Union Rock Company bonds:

Date of Interest Payment.			Amount of Interest Paid
9- 1-29			\$ 72,690.00
3- 1-30			70,680.00
9- 1-30	***		70,185.00
3- 1-31			68,085.00
9- 1-31	•		67,740.00
3- 1-32			65,280.00
9- 1-32		. 9	64,800.00
7-31-33	14		62,295.00
9- 1-33		3	61,485.00
			\$603,240.00

6. Interest paid by Consolidated Rock Products Co., for Consumers Rock & Gravel Company, Inc. bonds:

Date of Interest Payment.					» - I	Amount of Interest Paid
7- 1-29		•	•	4	\$	45,000.00
1- 1-30		9				45,000.00
7- 1-30						43,665.00
1- 1-31						42,375.00
<i>-7</i> - 1-31.		0				41,010.00
1- 1-32	•				7	40,890.00
7- 1-32		ra .			•	39,495.00
2-28-33					+9	39,330.00
7-31-33				•		37,875.00
. 1-31-34	:/.					37,665.00
			• .		. 9	412,305.00

7. Retirement of Union Rock Company bonds:

Date	Serial Maturities	Through- Sinking Fund	Bonds turned in for Cancellation	TOTAL
9- 1-29	\$ 60,000.00			\$ 60,000.00
9-30-29	: 0	\$ 7,000.00		7,000,00
4 1-30	J	16,500.00	\sim	16,500.00
9- 1-30	60,000.00			60,000.00
9-30-30	•	10,000.00		10,000.00
3- 1-31	¥2	11,500.00		11,500.00
91-31	60,000.00	13,000.00	•	73,000.00
10-27-31		9,000.00		9,000.00
3- 1-32		16,000.00		16,000.00
9- 1-32	55,000.00	28,500.00		83,500.00
7-31-33		27,000.00	•	27,000.00
2-16-34			\$57,000.00	57.000.00
7- 5-34			13,000.00	13,000.00
	\$235,000.00	\$138,500.00	\$70,000.00	443,500.00

In lieu of depositing cash with the trustee for the retirement of bonds due September 1st, 1933, the company deposited for cancellation \$57,000.00 par value of bonds maturing at later dates. This was done after conferences with the underwriter and enabled the company to use bonds which it had purchased prior to that time on the open market, leaving the relative number of bonds outstanding equivalent to that which would have

existed had the September 1st, 1933 maturities been paid off. The reason for its being \$57,000.00 instead of \$60,000.00 was because at prior times \$3,000.00 par value of bonds of September 1st, 1933, had been retired and cancelled.

Also, note that in September, 1932, \$55,000.00 par value were retired. There had been \$5,000.00 par value of that series cancelled and retired prior to that time.

The item of \$13,000.00 par value retired July 5th, 1934, was bonds purchased out of proceeds resulting from the sale of Obsolete and unnecessary personal property.

8. Retirement of Consumers Rock & Gravel Company bonds:

			Through	
•			Sinking	
Date			Fund	
1- 1-30		''	\$ 42,500.00	
1-31-30		. —	2,000.00	
7-30-30		-	1,500.00	
6 8-30-30			37,000.00	
11-30-30			4,500.00	
I- 1-31			45,500.00	
7- 1-31		٠.	4,000.00	
1- 1-32			46,500.00	
7- 1-32	*.		5,500.00	
2-28-33			48,500.00	
7-31-33	•		7,000.00	
1-31-34			50,000.00	
7-31-34			5,000.00	
		•		
0	6		\$299,500.00	
	•		· · · · · · · · · · · · · · · · · · ·	

Mr. Frank P. Doherty. November 26, 1937

The item of July 31st, 1934, represents \$5,000.00 par value bonds which were turned in for cancellation and retirement and were purchased out of proceeds resulting from the sale of obsolete and unnecessary personal. property.

9. Tonnage sold by Consolidated Rock Products Co. for the years 1929 to 1937, inclusive:

V		V	. 19391	Tons
Year		1		Sold
1929	(9 mos. 4/1)	to 12-3	1-29)	4,770,839.76
1930				4,049,672.91
1931				2,822,785.80
1932	and the second			2,480,799.55
1933			* , ø	1,974,109.92
.1934	•			874,334.99
1935				1,111,617.34
1936				2,300,258.97
1937	(9 mos. 1/1)	to 9-30)		2,031,290.37
8	TOTAL			22,415,709.61

	10. Amount of present bonded indel	btedness:
a.	Union Rock Company bonds ou standing	t- 14
	Owned by Consolidated Rock Product Co.	102,500.00
	Net in hands of public	\$1,877,000.00
b.	Consumers Rock & Gravel bonds out standing	-
	Owned by Consolidated Rock Product Co.	\$1,200,500.00 \$ 63,500.00
	Net in hands of public	\$1,137,000.00

11. Operating profit by years before bond interest and reserves for depreciation, depletion, amortization, etc.:

							110
 Year		•				Profit	
1929	(9 mos	.4/1 to	12/3	1) ·	.\$1	,009,504	4.55
1930			3.			649,778	8.19
1931	*				1	,026,027	7.02
1932			,			73,848	3.70
1933						230,309	9.33
1934					39	21,420	0.90
\;	(1/1) to	5/24	\$27,	301.05	5		
1935	**		-		,	49,092	2.51
91	(5/25)	o 12/31	76,	393.56	5		
1936						201,632	2.29
1937	(9 mos.	1/1 to	9/30)		×	199,890	0.82
•		4					-
	T	OTAL	, p	9.	\$3	,461,504	1.31
			-				

12. Net operating cost after allowance for bond interest and reserves for depreciation, depletion, amortization, etc., and taxes:

	۵			4	· N	Vet	Profit or Loss	5
	Year				3 .		own in Boldfac	
	1929			•		\$	90,276.62	
)	1930						620,258.85	
	1931	1	•				24,518.04	
	1932		1	•			589,458.31	
	1933			1	3		398,665.96	

11410 1 1 1000000	Mr. Frank	P.	Doherty	-5-	November	26,	1937.
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	Shown in Boldface
1934	\$ 575,187.10
(1/1-5/24- \$258,923.37	
1935	512,584.81
(5/25-12/31: 253,661.44	
1936	250,619.45
1937 (9 mos. 1/1 to 9/30)	76,608.58
ેવા ,	

\$2,957,624.49

[Note: Figures in Boldface underlined in red.]

13. Amount of delinquent interest on Union Rock Company bonds:

•	Date		Bonds Held by Public		Company Owned		TOTAL
			/		-	0	
	3-1-34		\$ 56,310.00	. 0	\$ 3,075.00		\$ 59,385.00
.0	9-1-34		56,310.00		3,075.00		59.385.00
	3-1-35	•	56,310.00	•	3,075.00		59,385.00
	9-1-35		56,310.00		3,075.00		59,385.00
	3-1-36	7	56,310.00	•	3,075:00		59,385.00
	9-1-36	•	56,310.00		3,075.00		59,385.00
	3-1-37		56,310.00	**	3,075.00		59,385.00
	4-1-37		9,385,00		512.50		9,897.50
Total							
as of	4-1-37		\$403,555.00		\$22,037.50	11"	\$425,592.50
	9-1-37	•	46,925.00	s*	2,562.50		49,487.50
	9-30-37		9,385.00	(accrued)	512.50		9,897.50
1.		,			-		
Total			,				
as of	9-30-37		\$459,865.00	6	\$25,112.50		\$484,977.50

14. Amount of delinquent interest on Consumers Rock & Gravel bonds:

Company

Bonds-Held

by Public

- 0	Date		by I done.		Owned		· ·
	7-1-34	:	\$ 34,110.00		\$ 1,905.00		\$ 36,015.00
	1-1-35		34,110.00		1,905.00		36,015.00
	.7-1-35 .		34,110.00		1,905.00		36,015.00
	1-1-36		34,110.00		1,905.00		36,015.00
	7-1-36		34,110.00		1,905.00		36,015.00
	1-1-37		34,110.00		1,905.00		36,015.00
	4-1-37		17,055.00		952.50		18,007.50
						•	
Total as of	4-1-37		\$221.715.00	•	\$12,382.50		\$234,097.50
	7-1-37	•	17,055.00		952.50		18,007.50
	9-30-37			(accrued)	952.50		18,007.50
Total	٠.		-				*
as of	9-30-37		\$255,825.00		\$14,287.50		\$270,112.50

15. Amount of delinquent installments on redemption of Union Rock Company bonds:

Serial Maturities

	Date		In Hands of Public		Owned by Consolidated		Sinking Fund	,	TOTAL	
	9-1-33		\$56,000.00		\$1,000.00		\$ 21,515.00		\$ 78,515.00	
	3-1-34						20,615.00		20,615.00	
	9-1-34		59,000.00		. 47.		21,615.00		80,615.00	
	3-1-35				10 177		20,615.00		20,615.00	
	9-1-35		• 50,000.00				30,615.00		80,615.00	
	3-1-36						20,615.00		20,615.00	
	9-1-36		58,000.00		2,000.00		20,615.00		80,615.00	
:	3-1-37						20,615.00		20,615:00	
	9-1-37		52,000.00		5,000.00		23,615.00		80,615.00	
			***************************************		\$8,000.00	7.	\$200,435.00		\$483,435.00	
		- 0	\$275,000.00		\$0,000.00		φ200,433.00°		\$400,400.00	

Mr. Frank P. Doherty 6 November 26, 1937.

We have shown serial maturity for September 1st, 1933, a total of \$57,000.00 as delinquent, but call attention to the fact that the company turned in \$57,000.00 par value of bonds for retirement in lieu of that maturity, which is explained above.

16. Amount of delinquent installments on redemption of Consumers Rock & Gravel bonds:

Date	Sinking Fund	Total
7-1-34	\$.8,985.00	\$ 8,985.00
1-1-35	51,485.09	51,485.00
7-1-35	8,985.00	8,985.00
1-1-36	51,485.00	51,485.00
7-1-36	8,985.00	8,985.00
1-1-37	51,485.00	51,485.00
7-1-37	8,985.00	8,985.00
	\$190,395.00	\$190,395.00

Please note that while the above figures are shown in cash, the Consumers trust indenture allows the company to deposit bonds at par in lieu of money in making such payments, so that the actual cash requirement would be the amount necessary to purchase additional bonds on the open market for that purpose.

I trust that the above will give the information desired. Copies of this letter are being sent to the attorneys mentioned in your letter of November 23rd.

Respectfully yours,
CONSOLIDATED ROCK PRODUCTS CO.
Robt. Mitchell (Signed)
Vice-President.

THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

In the Matter of)
1) In Proceedings
. CONSOLIDATED ROCK PROD-) for the
UCTS CO., a Delaware corpora-) Reorganization
tion,) of a Corporation
Debtor,)
) No. 25816-H
UNION ROCK COMPANY, a)
corporation,)
Subsidiary,	ORDER .
) APPROVING
CONSUMERS ROCK & GRAVEL) ·SPECIAL
COMPANY, INC., a corporation,)· MASTER'S
) REPORT
Subsidiary.) :

The findings and report of Frank P. Doherty, Esq., as Special Master in the above entitled cause, having been filed herein on February, 1938, in accordance with the order made herein on November 2, 1937, entitled "Order Appointing Special Master to Hear the Matter of the Proposal, Consideration and Confirmation of the Plan of Reorganization of Consolidated Rock Products Co., Dated March 15, 1937 and Objections Thereto," and no objections to said findings and report having been made or filed herein, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said findings and report of Special Master, dated February, 1938, and filed herein on February, 1938, be and the same hereby are approved and confirmed, and said findings and report are hereby adopted as the findings and conclusions of this Court; and

IT IS FURTKER HEREBY ORDFRED that counsel for the proponents of said Plan of Reorganization shall proceed with the organization of the new corporation referred to in said Plan and the preparation of the documents necessary for the consummation of said Plan; that the out-of-pocket expenses in connection therewith shall be paid by the Debtor; and that all such documents shall be submitted to this Court for approval; and

IT IS FURTHER ORDERED that counsel for the proponents of said Plan shall prepare a form of order for the confirmation of said Plan in accordance with Section 77B of the Bankruptcy Act and the rules of this Court, and submit such form of order to this Court for formal entry.

Dated:	 1938.

UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed R. S. Zimmerman, Gerk, at 58 min. past 10 o'clock Feb. 14, 1938 A. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

EXCEPTIONS OF OBJECTOR E. BLOIS dnBOIS TO FINDINGS AND REPORT OF SPECIAL, MASTER AND OBJECTIONS TO PLAN OF REORGANIZATION HEREIN DATED MARCH 15, 1937 AS RECOMMENDED.

Comes now E. BLOIS duBOIS, an Sjector of record to confirmation of the Plan of Reorganization of the above named debtor corporations, submitted by Condidated Rock Products Co., Union Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee, dated March 15, 1937, and excepts to the Findings and Report of the Special Master, Frank P. Doherty, Esq., filed herein February 14, 1938, in the foll wing particulars, to-wit:

To that portion of the Findings captioned "Subsequent Betterments and Additions to Equipment of Union Company and Consumers Company," and to each and every part thereof, Master's Report, pages 21 and 22, reading as follows, commencing in line 10, page 21:

"The evidence shows that substantial sums were expended by Consolidated in the repair and maintenance of the properties of the Union Company, Consumers Company, and Reliance Company, and also that the trucks and automobiles and portions of the other equipment of the three above mentioned subsidiaries became unserviceable and worn out in the usual course of the operations in the carrying on of the business by consolidated, and

that equipment was purchased by Consolidated out of the funds and moneys of Consolidated to replace said worn out and unserviceable equipment and to purchase new and additional trucks and equipment and appliances. The evidence further shows that in some instances the trucks and automobiles which were worn out and unserviceable were turned in or delivered as a part payment on account of the new trucks and other equipment acquired by Consolidated; that such new and renewed equipment so purchased by Consolidated was necessary, proper, and essential to the carrying on of the business of Consolidated and its subsidiaries; that the funds with which said new and additional equipment was purchased and paid for were supplied by Consolidated from the usual operating revenues of the properties of the Union Company, Consumers Company, and Reliance Company, and also from the properties of Consolidated, and also from proceeds received by Consolidated from the sale of its stock to the The evidence further shows that there was such commingling of said funds last hereinabove referred to as to make it impracticable, from an accounting or other standpoint, to determine the amount of money from either or all of the respective sources which was used to replace, renew, or purchase additional trucks, automobiles, and other appliances and equipment used by Consolidated in and about the business. It is therefore found that, assuming that the lien of the Trust Indentures of the Union Company and the Consumers Company pursued and attached to such new, renewed, and additional equipment so as to subject said trucks, automobiles, appliances, and other equipment to the lien of said Trust Indenture and as security for the bonds issued thereunder, it is both impracticable and, from an accounting standpoint, impossible to determine to what extent the equipment now owned and

operated by Consolidated is a renewal, replacement, or substitution of such automobiles, trucks, appliances, and other equipment of the Union Company, the Consumers Company, and the Reliance Company, or is new equipment purchased by Consolidated for and on its own account from the proceeds resulting from the operation of the properties by Consolidated or from the funds received from the sale of Consolidated stock, and therefore not subject to the lien of said Trust Indentures, Special Master's Exhibits 12 and 13."

II.

To that portion of the Findings captioned "Plan is Fair and Has been Approved by Required Percentage of Bondholders and Stockholders," Master's Report, page 25, finding the Plan of Reorganization to be fair to the bondholders of Union Rock Company and/or Consumers Rock & Gravel Company, Inc., and to the further portion of the Findings under said caption, commencing at the end of line 28, page 27 of the Master's Report, and reading as follows:

"It is found that the Consolidated stockholders have substantia! equities in the properties included in the plan of reorganization, and that the interests and rights granted said stockholders under the plan of reorganization are not out of proportion to the equities of said stockholders, considering their contribution to the existing properties now represented by the consolidated companies and that the plan of reorganization is fair, just and equitable with respect to the rights of said stockholders."

To all that portion of the Findings captioned "Findings with Respect to the Objections of Objector E. Blois duBois," Master's Report, page 28, commencing at line 18, page 29, and reading as follows:

"The main and principal objection of Mr. duBois to the plan of reorganization may be summarized as follows: That the stockholders of Consolidated have no equity in or to the properties represented by the plan of reorganization, and that said stockholders should not be given-any right or interest under said plan, and that the entire properties of the Union Company, Reliance Company, Consumers Company and of Consolidated, including all of the equipment, trucks, automobiles and appliances; be available for sole benefit of the bondholders of the Union Company and Consumers Company. The evidence shows that the objection of Mr. duBois is without merit or support. The other objections of Mr. duBois, as presented in his written objections and at the hearing, have been covered by other portions of these findings and are likewise without merit or support,"

and to the failure of the Master to find specifically upon the several objections to the Plan of Reorganization presented in the written objections of said E. Blois duBois on file herein.

IV.

To that portion of the Findings captioned "Independent Appraisal," Master's Report, page 30, and each part thereof, reading as follows:

"The plan of reorganization, as heretofore found, is the result of nearly two years of conscientions effort

of opposing and conflicting interests. The evidence developed that there has been such a commingling of the assets and properties, including the funds from the sale of stock of Consolidated, that an appraisal of the properties would be of no value to the court and would be of such indefinite and unsatisfactory nature as to produce further confusion, and a separate, independent appraisal would result in unnecessary and great delay and expense to all parties. Its benefits would be highly There is no evidence that the plan of problematical. reorganization has dealt unfairly or inequitably with the bondholders of the Union and Consumers companies or the stockholders of Consolidated. All interests are unanimous in their conviction that none of the interests are receiving as much as they are entitled to. The evidence shows, however, that the division of the respective interests in the plan of reorganization not only presents a feasible and workable plan, but likewise has taken into consideration all of the claims, equities and rights of the bondholders and stockholders and has arrived at a plan which gives full recognition to the rights and equities of each class."

and to the failure of the Master to order disinterested appraisal of the assets of the respective corporations proposed to be transferred to the new corporation in effecting reorganization of the debtor companies, or otherwise to evaluate the interests of the respective parties to the Plan of Reorganization.

V.

To the failure of the Special Master to find upon the question of the solvency of Union Rock Company and/or Consumers Rock & Gravel Company, Inc.

To the failure of the Special Master to find upon the validity of the agreement purported to have been entered into by Consolidated Rock Products Company, Union Rock Company, Consumers Rock & Gravel Company, Inc. and Reliance Rock Company under date of February 16, 1933, purporting to modify the original operating agreement entered into by said companies under date of July 15, 1929, copies of which agreements are attached to the Special Master's Report as exhibits.

VII.

To the failure of the Special Master to make any finding with respect to the indebtedness owing by Consolidated Rock Products Company, Union Rock Company, Consumers Rock & Gravel Company, Inc. and/or Reliance Rock Company, one to the other, under the written agreements referred to in Exception VI above.

The exceptions to the specific findings of the Special Master referred to in Exceptions I, II, III and IV above are based upon the fact that said specific findings are contrary to the evidence adduced before the special master showing:

(1) That funds used by Consolidated Rock Products Company for making repairs, subsequent betterments and additions to the equipment and properties of Union Rock Company and Consumers Rock & Gravel Company included funds taken over by Consolidated Rock Products Company from the subsidiaries at the time of the so-called consolidation, or commencement of joint operation, as

well as from operation and exploitation thereafter of the properties of the subsidiaries, and that pursuant to the covenants of the original operating agreement of July 15, 1929 full and complete books of account were kept showing the charges for such improvements and betterments against the respective companies, and that no such confusion of assets has resulted that definite determination as to what properties belong to the respective companies, the true valuation thereof, and to what liens such assets may be subject, cannot be determined;

- (2) That Consolidated Rock Products Company, as the sole stockholder of Union Rock Company and Consumers Rock & Gravel Company, Inc., has no substantial or other equity in either company, is indebted to said subsidiaries under the operating agreement attached to the Special Master's report in an amount in excess of \$6,000,000.00, which it is unable to pay, and has no property of substantial value to contribute to the Plan of Reorganization so as to justify its retention of equity ownership while bonded indebtedness is being halved, accrued interest waived and future interest reduced;
- (3) That confusion is present with respect to the actual value of the assets of Union Rock Company, Consumers Rock & Gravel Company and Consolidated Rock Products Company and that disinterested appraisal of assets is essential to proper evaluation of the interests of the respective parties to the Plan of Reorganization so as to permit the court to pass upon the fairness of the plan;

(4) That the objections of Objector E. Blois duBois to the unfairness of the plan are meritorious and that the plan contemplates a reduction of the lien interest of the bondholders for the benefit of the stockholders of Consolidated Rock Products Company, who at the present have no substantial equity and are called upon to make no sacrifice whatever under the Plan of Reorganization.

Exception to the failure of the Special Master to find upon the matters referred to at the conclusion of Exception III, at the conclusion of Exceptions IV and in Exceptions V, VI and VII is based upon the fact that reference to the Special Master was made in part for the purpose of passing upon the matters as to which no findings have been made, and that findings upon said matters are essential to proper determination of the issues before the Court, including the fairness of the Plan of Reorganization and the respective rights of the various parties interested therein.

For the reasons stated, said Objector, E. Blois duBois, objects to confirmation by the Court of the Plan of Reorganization pursuant to the recommendation of the Special Master.

Dated: March 4, 1938.

John G. Mott Paul Vallee Kenneth E. Grant

> Attorneys for Objector to Plan of Reorganization, E. Blois duBois.

Received copy of the within EXCEPTIONS OF OB-JECTOR E. BLOIS duBOIS TO FINDINGS AND REPORT OF SPECIAL MASTER AND OBJEC-TIONS TO PLAN OF REORGANIZATION HERE-IN DATED MARCH 15, 1937 AS RECOMMENDED this 4th day of March, 1938.

> O'MELVENY, TULLER & MYERS, By Milton A. Taylor

> > Attorneys for Union Rock Company Bondholders' Protective Committee.

LATHAM, WATKINS & BOUCHARD, By I. V. Hughes

Attorneys for Consolidated Rock Products Company.

GIBSON, DUNN & CRUTCHER, By

Attorneys for Consumers Rock & Gravel Co., Inc. Bondholders' Protective Committee.

Received copy of the within document Mar 4 1938 GIBSON, DUNN & CRUTCHER

Per A

ALFRED E. ROGERS (C).
(Alfred E. Rogers)
Attorney for T. C. Rogers.

E. S. WILLIAMS
(E. S. Williams)
In Propria Persona.

STANLEY ARNDT (Stanley Arndt)

[Endorsed]: Filed R. S. Zimmerman, Clerk at 49 min past 2 oclock. Mar 4, 1938 P. M. By M. J. Sommer, Deputy Clerk.

- 4. 12m

SUPPLEMENTAL EXCEPTION OF OBJECTOR E. BLOIS duBOIS TO FINDINGS AND REPORT OF SPECIAL MASTER AND OBJECTIONS TO PLAN OF REORGANIZATION HEREIN DATED MARCH 15, 1937 AS RECOMMENDED.

Comes now E. BLOIS duBOIS and by way of supplement to his Exceptions to the Findings and Report of the Special Master herein adds the following further exception to said Report and Findings:

VIII.

With reference to the Findings of the Special Master as to the value of the properties involved, Master's Report, pages 22 to 25, both inclusive, exception is taken to the value of \$1,000,000.00 placed upon the assets of Consolidated Rock Products Company and the value of \$500,000.00 placed upon its good will and going business value, on the ground that said Findings, and each of them, are not supported by the evidence and that the finding as to good will and going business value is not supported by competent testimony, but merely by the guess and speculation of one witness.

Dated: March 5, 1938.

John G. Mott .
Paul Vallee
K. E. Grant

Attorneys for Objector to plan of Reorganization, E. BLOIS duBOIS.

Received copy of the within SUPPLEMENTAL EXCEPTION OF OBJECTOR E, BLOIS duBOIS TO FINDINGS AND REPORT OF SPECIAL MASTER AND OBJECTIONS TO PLAN OF REORGANIZATION HEREIN DATED MARCH 15, 1937 AS RECOMMENDED.

O'MELVENY, TULLER & MYERS

3-5-38 By Milton A. Taylor

Attorneys for Union Rock Company Bondholders' Protective Committee.

LATHAM, WATKINS & BOUCHARD,

Mar. 5, By Paul R. Watkins

1938 Attorneys for Consolidated Rock Products Company.

GIBSON, DUNN & CRUTCHER,

Received copy of the within Document Gibson, Durn

Attorneys for Consumers Rock & Gravel Co., Inc. Bondholders' Protective Committee.

Mar 5 1938

& Crutcher

Per A

Alfred E. Rogers

(Alfred E. Rogers)

Attorney for T. C. Rogers

3-5-38 E. S. Williams WHW

(E. S. Williams)

In Propria Persona.

3-5-38 Stanley Arndt (Stanley Arndt)

[Endorsed]: Filed R. S. Zimmerman, Clerk at 30 min past 11 oclock Mar 5, 1938 A. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

MOTION TO RE-OPEN HEARING WITH RE-SPECT TO CONFIRMATION OF PROPOSED PLAN OF REORGANIZATION

Comes now E. BLOIS duBOIS, an objector of record in the above entitled matter to confirmation of the plan of reorganization heretofore proposed herein by Consolidated Rock Products Company, Union Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee, by his undersigned attorneys, and respectfully moves the court to re-open the hearing with respect to confirmation of the proposed plan of reorganization, and objections thereto, upon the ground that: A consideration of the marked improvement in the financial and business condition of the debtor companies involved in these proceedings, as shown by earnings statements for the period since the previous hearing herein, is essential to proper disposition of the cause and confirmation or rejection by the court of the proposed plan of reorganization.

Dated: Los Angeles, California, July 22, 1938.

MOTT, WABLEE AND GRANT Kenneth H. Grant John G. Mott Paul Vallee

Attorneys for E. Blois duBois, Objector to Plan of Reorganization.

Received copy of the within Motion to re-open Hearing with respect to Confirmation of Proposed Plan of Reorganization this 22nd day of July, 1938.

LATHAM WATKINS. & BOUCHARD,

By I. V. Hughes

Attorneys for Consolidated Rock Products Company

O'MELVENY, TULLER & MYERS,

By Milton A. Taylor

Attorneys for Union Rock Company Bondholders' Protective Committee

GIBSON, DUNN & CRUTCHER,

Attorneys for Consumers Rock & - Gravel Company, Inc. Bondholders' Protective Committee

Stanley Arndt

(Stanley Arndt) I B

Attorney for Preferred Stockholders

Alfred E. Rogers

(Alfred E. Rogers)

Attorney for T. C. Rogers

[Endorsed]: Received copy of the within Document Jul 22 1938. Gibson, Dunn & Crutcher Per A' Filed R. S. Zimmerman, Clerk at 18 min. past 11 o'clock Jul. 22, 1938 A. M. By R. J. Clifton Deputy Clerk. [TITLE OF DISTRICT COURT AND CAUSE.]

AFFIDAVIT IN SUPPORT OF MOTION TO RE-OPEN HEARING ON PLAN OF REORGANI-ZATION PROPOSED, AND OBJECTIONS THERETO No. 25816-H

STATE OF CALIFORNIA)

) ss

County of Los Angeles

KENNETH E. GRANT, being first duly sworn, on oath deposes and says:

That he is a member of the law firm of Mott, Vallee & Grant, attorneys at law, with offices in the City of Los Angeles, California, and one of the attorneys of record herein for E. Blois duBois, an objector to the plan of reorganization of the debtor companies involved herein proposed by Consolidated Rock Products Co., Union-Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee.

That hearing on objections to said plan of reorganization was had before Frank P. Doherty, Special Master, on November 8, 9, 10, 12, 15 and 17, 1937, and thereafter, on or about February 14, 1938, said Special Master filed herein his findings and report; that subsequent thereto hearing on exceptions taken to the said findings and report of the Special Master was had in the above entitled court and the matter was then taken under submission by the court; that since November 11, 1937, when the taking of evidence in support of and in opposition to the proposed plan of reorganization was completed before the Special Master, there has been a marked improvement in the financial and business condition of the debtor companies involved in these proceedings as shown by the published statements of earnings issued by them.

That the following facts have come to the attention of affiant:

- 1: During the first six months period of 1938 Consolidated Rock Products Co., and its wholly owned subsidiaries Union Rock Company and Consumers Rock & Gravel Co., Inc., returned a consolidated net profit of \$25,255.00 after payment of all charges, including provision for bond interest, depletion, depreciation and amortization, said net profit contrasting with a consolidated net loss for the like period of 1937 of \$37,077.00.
- 2. Net income for the first six months of 1938, before provision for bond interest, depreciation, depletion and amortization, was \$195,660.00 against \$146,407.00 in the like period of 1937, or an increase of \$49,253.00.
- 3. Sales in the first six months of 1938 aggregated \$1,711,402.00 against \$1,750,203.00 in the corresponding period of 1937.

That it appears from the foregoing that the improvement in the financial and business condition of the companies involved herein has been such that they are able on the basis of current earnings to service their outstanding bonds and to make proper provision for depletion, depreciation and amortization.

That in the light of the present condition of said companies the drastic treatment of the bonded indebtedness of said companies, and the holders thereof, contemplated in the plan of reorganization now before the court, is entirely unnecessary, to rehabilitation of the companies, and eminently unfair to the aforesaid objector E. Blois du Bois and other owners of bonds of the subsidiaries Union Rock Company and Consumers Rock & Gravel Company, Inc.

Kenneth E. Grant

Subscribed and sworn to before me this 21st day of July, 1938.

[Seal] Katherine Spengler
Notary Public in and for the County of Los Angeles,
State of California

Received copy of the within Notice of Motion to Re-Open Hearing with respect to Confirmation of Proposed Plan of Reorganization, and Affidavit in support of said Motion, this 22nd day of July, 1938.

LATHAM, WATKINS & BOUCHARD, By I V Hughes

Attorneys for Consolidated Rock Products Company

O'MELVENY, TULLER & MYERS,..

By Milton A Taylor

Attorneys for Union Rock Company
Bondholders' Protective Committee

GIBSON, DUNN & CRUTCHER,
Attorneys for Consumers Rock &
Gravel Company, Inc. Bondholders'
Protective Committee

Stanley Arndt

(Stanley Arndt) I B

Attorney for Preferred Stockholders

Committee

Alfred E. Rogers

(Alfred E. Rogers)

Attorney for T. C. Rogers

[Endorsed]: Received copy of the within Document Jul 22 1938 Gibson, Dunn & Crutcher Per A Filed R. S. Zimmerman Clerk at 18 min. past 11 o'clock Jul. 22, 1938 A. M. By R. B. Clinton Deputy Clerk [TITLE OF DISTRICT COURT AND CAUSE.]

MOTION TO DISMISS "MOTION TO RE-OPEN HEARING, ETC.", DEMURRER, OBJECTION TO MOTION, MOTION TO EXCLUDE, ETC.

Come now the Preferred Stockholders' Committee and the members thereof and (1) move to dismiss the motion of E. Blois duBois, entitled "MOTION TO RE-OPEN HEARING WITH RESPECT TO CONFIRMATION OF PROPOSED PLAN OF REORGANIZATION"; (2, demur to said motion of E. Blois duBois; (3) object to consideration of said motion of E. Blois duBois or the hearing thereof; and (4) object to the introduction of any evidence in support thereof or the consideration of the affidavit attached to the notice of motion thereof.

Said motions, demurrer, and objections, and each and every one of them, are based upon each and every one of the following grounds, to wit:

- 1. The motion does not state facts sufficient to constitute grounds for a motion or grounds or reasons for granting the relief prayed for or any relief whatsoever, or for the re-opening of the hearings herein.
- 2. The affidavit of Kenneth E. Grant, dated July 21, 1938, does not state facts sufficient to constitute grounds for a motion or grounds or reasons for granting the relief prayed for or any relief whatsoever, or for the re-opening of the hearings herein.
- 3. No allegation or showing is made that the alleged improvement in the financial and business condition of the debtor was not or should not have been reasonably contemplated at the time of the previous hearings before

the Special Master herein or at the time of the submission of the exceptions to the Special Master's report to the Court herein.

- 4. There is no allegation or showing made that the decreased sales as shown in the affidavit (the decrease from \$1,750,203.00 to \$1,711,402.00) reflects an improvement in the financial or business condition of the said companies or that it was a matter that was not reasonably to have been contemplated at the time of the previous hearings before the Special Master or at the time of the submission of the exceptions to the Special Master's report to the Court herein.
- 5. There is no allegation or showing made, and it does not appear in the motion or in the affidavit, that the increase in net income or net profit was not reasonably to have been anticipated or contemplated at the time of the previous hearings before the Special Master or at the time of the submission of the exceptions to the Special Master's report to the Court herein.
- 6. There is no showing or claim made, and it does not appear in the moving papers or in the affidavit, that the increase in net profit and net income was not due to economies reasonably to have been anticipated or contemplated at the time of the hearing, or was not due to improved business conditions reasonably to have been contemplated or anticipated at the time of the previous hearings, or was not due to confidence inspired in the trade because of the action of the Special Master and of the Court herein in approving the plan, or was not due to confidence and better esprit de corps within the organization of the debtor corporations because of the

actions of the Special Master and of the Court in approving the plan herein.

- 7. No claim or showing is made, and it does not appear in the moving papers or in the Edavit, that the better financial and business conditions claimed to exist at the present time were not in existence at the time the exceptions to the Special Master's report were submitted to the Court for the Court's hearing and determination.
- 8. It does not appear therein nor is any showing made that a consideration of any improvement in the financial or business condition of the debtor companies is essential to the proper disposition of the cause and confirmation or rejection by the Court of the plan of reorganization.
- 9. That the statement contained in the Grant affidavit, on page 3 thereof, that "the treatment of the bonded indebtedness of the said companies and the holders thereof contemplated in the plan of reorganization now before the Court is entirely unnecessary to rehabilitation of the companies and eminently unfair to the aforesaid objector E. Blois duBois and other owners of bonds" is purely a conclusion and no facts are shown or allegations made supporting such conclusion or showing how or why the treatment of the bonded indebtedness in the plan of reorganization is "entirely unnecessary to rehabilitation of the companies" or showing that it is "eminently" or at all "unfair" to the objector or any other bondholder.
- 10. That the hearing before the Court herein and at the hearing before the Special Master herein, said

objector took the position that there was no equity whatsoever for the preferred stockholders and, therefore, it
was improper to allow the preferred stockholders any
participation in the reorganization. It does not appear
in the moving papers or in the affidavit thereto whether
the objector now contends that the properties are worth
more than they were formerly and that there now is an
equity for the preferred stockholders or whether the
objector still contends that there is no equity for the
preferred stockholders; nor does it appear whether the
objector waives the objection he formerly strenuously
advocated that there was no equity for the preferred stockholders or whether he still seeks to support that former
objection while, at the same time, taking the position set
forth in his moving papers.

11. That the objector does not come before the Court with clean hands and has taken inconsistent positions in that he is still maintaining his position heretofore made that the preferred stockholders have no equity and should not be included in a plan of reorganization and, at the same time, maintaining and contending that the business and financial condition of the debtor companies has so improved that there is no need for reorganization. Said objector is estopped from taking such inconsistent positions and these moving parties now move the Court to require him to make his position more certain and definite and to elect and set forth whether or not he claims and maintains that there is any equity for the preferred stockholders.

Objection is further made to the consideration of the motion of said DuBois herein on the ground that notice has not been given as required by law and that notice has not been given to the persons to whom notice was given of the original hearings before the Special Master and to whom notice was given of the hearing of the objections and exceptions to the Special Master's report filed by said DuBois.

WHEREFORE, the Preferred Stockholders' Committee and the members thereof, on behalf of themselves and on behalf of all interested parties herein, pray that no relief whatsoever be granted on said motion of DuBois to re-open the hearing herein, that said motion of DuBois be dismissed with prejudice, and for such other and further relief as may be fit and proper in the premises.

Dated, August 5, 1938.

Stanley Arndt

Attorney for Preferred Stockholders' Committee and the members thereof.

[Endorsed]: Received copy of the within Motion. Mott, Vallee & Grant, attorneys for DuBois, Gibson, Dunn and Crutcher, attorneys for Consumers B. P. C. Latham, Watkins & Bouchard, Attorneys for Debtors. O' Melveny, Tuller & Myers, attorneys for Union Rock Bondholders Committee. Filed 10:05 A. M. Aug. 5, 1938. R. S. Zimmerman Clerk By L. Wayne, Thomas Deputy.

At a stated term, to wit: The February Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 5th day of August in the year of our Lord one thousand nine hundred and thirty-eight

Present:

The Honorable HARRY A. HOLLZER, District Judge.

In the Matter of (Consolidated Rock Products Co., No. 25,816-H Bkcy Debtor.)

This matter coming on for hearing on motion of E. Blois du Bois to re-open hearing with respect to confirmation of proposed Plan or Reorganization, pursuant to Notice filed July 22, 1938; Graham L. Sterling, Jr., Esq., appearing for the Union Rock Company Bondholders Protective Committee; Thos. H. Joyce, Esq., appearing for the Consumers Rock Company Bondholders Protective Committee; E. W. Williams, being present in propria persona; Paul R. Wattins, Esq., appearing for the Debtor; Kenneth E. Grant, Esq., appearing for E. Blois du Bois; and H. A. Dewing being present as court reporter and reporting the proceedings; it is ordered that a reporter attend and that his fees be paid by the Debtor estate:

Attorney Arndt moves to dismiss motion to re-open hearing and files motion to dismiss "Motion to Re-Open. Hearing, Demurrer, Objection to Motion and Motion to Exclude, etc."

Attorney Grant argues in support of motion to re-open hearing and moves that Financial Statement of June 30, 1938, and Master's Report and Petition of the Debtor, for leave to pay off mortgaged indebtedness, filed July 31, 1938, be admitted in evidence for the purpose of this motion, and there being no opposition it is so ordered. Attorney Watkins argues in opposition to motion to re-open; Attorney Arndt makes a statement; whereupon, it is ordered that motion to re-open hearing be; and it is, denied, and exception noted to Movant du Bois.

Attorney Grant moves that Financial Statement of the Debtor as of June 30, 1938, and Petition of the Debtor for leave to pay Mortgage indebtedness filed July 31, 1938, be admitted in evidence on hearing on the Plan of Reorganization and there being no objection, it is so ordered.

Memorandum of Conclusions, Judge Hollzer's Calendar, Aug. 8, 1938

It appearing that a plan of reorganization has been filed herein on behalf of the debtor corporation, to-wit, · Consolidated · Rock Products Company, and its wholly owned subsidiary corporations, to-wit; Union Rock Company and Consumers Rock & Gravel Company, that objections to said plan have been filed by E. S. Williams as the owner and holder of Union Rock Company bonds in the principal amount of \$7,000, also by E. Blois duBois as the owner and holder of Union Rock Company bonds in the principal amount of \$150,000, and of Consumers Rock & Gravel Company bonds in the principal amount of \$31,000, and also by Edward E. Hatch and Louis Van Gelder as members of the sub-committee of the stockholders' committee of preferred stockholders of Consolidated Rock Products Company and as preferred stockholders, also that the objections interposed by and on behalf of preferred stockholders have been abandoned and withdrawn, and that said proposed plan has been referred to a special master to hear the same and all matters in connection therewith, including any and all objections thereto other than as to its constitutionality. which latter question has been submitted directly to the court for its consideration and determination; and

It further appearing that a hearing with respect to said plan and all objections thereto, other than as to the question of constitutionality, has been had before said special master and that the latter has reported his findings and conclusions thereon, and particularly has found that

said plan is fair, just and equitable and has recommended that the same be confirmed; and

It further appearing that prior to the year 1929 several companies were engaged in the business of mining, processing, shipping and selling rock, sand and gravel in Southern California, that the companies doing the major portion of this kind of business were the two subsidiary corporations involved herein and another corporation operating under the name of Reliance Rock Company; and

It further appearing that in the early part of the year 1929 said Union Rock Company had outstanding first mortgage bonds in the principal amount of approximately \$2,400,000 par value and said Consumers Rock and Gravel Company had outstanding first mortgage bonds in the principal amount of approximately \$1,500,000 par value, also that said Reliance Rock Company became a subsidiary of said Union Rock Company through the ownership by the latter of all the stock of the former, that thereafter and in the year 1929 the debtor corporation was organized and acquired all of the outstanding capital stock of said Union Rock Company and all of the outstanding capital stock of said Consumers Rock and. Gravel Company, that funds in the amount of approximately \$7,000,000 were obtained by the debtor corporation through the sale of its preferred and common stock to the general public, that said funds were used to purchase all of the above mentioned stock of its subsidiary companies and also to provide additional working capital, that thereafter and under date of July 15, 1929, a certain operating agreement was entered into between the debtor corporation and its wholly owned subsidiary companies, under the terms of which operating agreement all of said

wholly owned subsidiaries ceased all operating functions and the entire management, operation and financing of the business and properties of all of said subsidiary corporations were transferred to and assumed by the debtor corporation, that likewise all of the cash, securities, notes, bills and accounts receivable, book accounts, manufactured materials and materials in process, and also all contracts for the sale of materials of said subsidiaries, were transferred to the debtor corporation, also that although said subsidiary companies maintained their separate corporate entities, yet their assets were carried on the books of the debtor corporation as assets of the latter and the liabilities of the former were also carried on the books of the debtor corporation as its liabilities, that the debtor corporation assumed all of the functions not only of an operating a company but also those of company ownership, that the directors of the debtor corporation selected the directors of all of its subsidiaries, that said operating agreement was executed by virtually the same individuals acting as officers, not only of the debtor corporation, but also of all of its subsidiaries, and that said operating agreement recited in part as follows:

"It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for the benefit of any third person as that term is used in Section 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereofy?"

It further appearing that thereafter and under date of February 16, 1933, said aforementioned operating agree-

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ment was modified by another operating agreement, that said amended operating agreement was executed by the same individuals acting as officers, not only of the debtor corporation, but also of all of its subsidiaries, that said amended operating agreement recites in part as follows:

"WHEREAS under said agreement it was provided that Operating Company was to be charged with depreciation, amortization, depletion and obsolescence, hereinafter referred to as "depreciation", on the properties of the Owning Companies, without setting forth the basis therefor, and whereas depreciation has been set up by the accountants based on the then book value of Owning Companies' properties, and

"WHEREAS it appears to Operating Company and Owning Companies that the depreciation on said basis was and is unfair, inequitable and actually not contemplated by the parties at the time the agreement was entered into, and

"WHEREAS said agreement contains no default provision and it is believed that one should be set forth, and

"WHEREAS, pursuant to said agreement it was provided that any party thereto could terminate said operating agreement as to its particular property upon thirty days' written notice of its intention so to do, and

"WHEREAS Operating Company is unwilling to proceed further under said operating agreement unless it is revised and changed both as to said depreciation and as to said termination, and

"WHEREAS it is deemed not only extremely desirable and advantageous to Owning Companies that said operating agreement continue, but is also deemed fair and equitable and in accordance with what should have been the original agreement of the parties hereto, that said depreciation be adjusted along the lines hereinafter set forth and that said agreement be for a fixed period terminable prior thereto only with the written consent of Operating Company and any two of Owning Companies, so that no one of Owning Companies nor Operating Company, can withdraw from said operating agreement and thereby actually destroy the purpose thereof, and

"WHEREAS Operating Company is willing as a part of the consideration for the execution of this agreement to forego and cancel its option to purchase the property of Owning Companies set forth in Section 12 of the above mentioned operating agreement, *******

2. That anything in said operating agreement contained to the contrary notwithstanding—and regardless: of how said item may be absorbed or set up by the individual Owning Companies—the 'depreciation' to credited to the Owning Companies' account by Operating Company shall actually be credited only upon the termination of the agreement and that at said time it shall be arrived at upon the following basis: The Operating Company and each Owning Company shall within five days after such termination appoint one appraiser. Within five days thereafter the appraiser of the Operating Company with the appraiser from each respective Owning Company shall appoint a third appraiser. Within ninety days after the appraisers are so appointed, they shall as to the respective properties ascertain the amount of the depreciation which should be credited to the respective Owning Companies for the period of the agreement, starting April 1, 1929 and ending with

the date of termination. Such depreciation shall be based. upon the appraised actual values of said properties, regardless of book values, starting April 1, 1929 and reappraised as of the first day of April of each year there after. The basis of depreciation shall also be determined by said appraisers in such report and shall be such basis as is usual and customary in said business-taking into consideration the use made thereof by Operating Companyand fair and equitable to the Operating Company and the respective Owning Companies. The figures so arrived at shall be the amount to be credited to the account of the Owning Companies respectively, and settlement between the Operating Company and the respective Owning Companies shall be made within ten days after the completion of said appraisal in accordance with the current account of the parties on said date."

It further appearing that from 1929 to 1934 the debtor corporation paid in excess of \$1,000.000 in interest and for the retirement of bonds of said Union Rock Company, and paid in excess of \$700,000 in interest and for the retirement of bonds of said Consumers Rock and Gravel. Company, that the amount of the present bonded indebted ness of said subsidiary corporations is as follows:

Union Company bonds outstanding	\$1,979,500
Union Bonds owned by Consolidated	102,500
Net Union bonds in the hands of the public	1,877,000
Consumers bonds outstanding	1,200,500
Consumers bonds owned by Consolidated .	63,500
Net Consumers bonds in hands of the public	1,137,000

It further appearing that the first interest default on the Union Rock Company bonds occurred on March 1, 1934 and has continued to date, and that the first interest default on the Consumers Rock & Gravel Company bonds occurred on July 1; 1934 and has continued to date; and

It further appearing that betterments and additions have been made to the equipment and properties of said subsidiary companies by the debtor corporation and that there has been a very considerable commingling of funds, equipment and properties of the debtor corporation and its subsidiary companies all as described and found by the special master; and

It further appearing that there has been such a commingling of the assets and properties of said debtor corporation and its subsidiaries that a separate, independent appraisal of such assets and properties would hardly be feasible, that to attempt to make such appraisal would result in unnecessary and great delay and expense to all interested parties, and that it is extremely doubtful whether any substantial benefit would be derived by such appraisal; and

It further appearing, that although according to the entries appearing on the books of said debtor corporation the latter appears to be indebted to its said subsidiaries in a sum totaling approximately \$7,000,000, nevertheless said entries have the computed upon the basis of the terms and provisions of said original operating agreement and not upon the basis of the terms and provisions of said

amended operating agreement, that no computation to determine the amount of any indebtedness owing by said debtor corporation to its said subsidiaries has been made in conformity with the terms and provisions of said amended operating agreement, that to undertake to enforce the terms and provisions of said criginal operating agreement as the basis for determining the amount of any indebtedness owing by said debtor corporation to its subsidiaries would result in protracted and very costly litigation and it is exceedingly doubtful whether such litigation would prove beneficial to any of the interested parties, particularly to the objecting bondholders; and

It further appearing that said proposed plan has been evolved and prepared under the conditions and in the manner described and found by the special master, that said plan has received the approval of more than the requisite percentage of all classes of creditors and stockholders, also that all interested parties, so far as they have made their views known to the court, are opposed to foreclosure and liquidation, that, so far as they have made their respective positions known to the court, all interested parties believe that a plan of reorganization which contemplates the continuance of the operation of all of the properties involved herein as one unit, under one management and ownership, offers the greatest assurance that the owners of the bonds of said subsidiary companies will be paid an amount approximately the par value of such bonds and further offers the greater probability of preserving for the stockholders a substantial equity after the bondholders shall have been paid as provided in said plan; and

It further appearing that under the proposed plan of reorganization all of the assets of said debtor corporation and its subsidiaries are to be transferred to a new corporation and that the owners of said Union Rock Company bonds, instead of having their present bonds, secured by a lien against the tangible properties of said Union Rock. Company, the identity of some of which properties it would be exceedingly difficult, if not impossible to ascertain, will receive bonds to be issued by such new company in an amount equalling one-half of the present par value thereof and secured by a lien against all of the combined tangible properties of said debtor corporation and all of its subsidiaries, and will also receive preferred stock to be issued by such new company in an amount equalling the remaining one-half of the present par value of said bonds, which preferred stock will have attached thereto warrants permitting the purchase of common stock of the new company under specified conditions, also that the owners of said Consumers Rock & Gravel Company bonds, instead of having their present bonds, secured by a lien against the tangible properties of said Consumers Rock & Gravel Company, the identity of some of which properties it would be exceedingly difficult, if not impossible to ascertain, will receive bonds to be issued by such new company in an amount equalling one half of the present par value thereof and secured by a lien against all of the combined tangible

properties of said debtor corporation and all of its subsidiaries, and will also receive preferred stock to be issued by such new company in an amount equalling the remaining half of the present par value of said bonds, which preferred stock will have attached thereto warrants permitting the purchase of common stock of such new company under specified conditions; also that the owners of the outstanding preferred stock of said debtor corporation will receive in exchange for the same common stock to be issued by such new company, share for share, and that the owners of the outstanding common stock of said debtor corporation will receive in exchange for the same warrants to purchase stock to be issued by such new company at definite prices and under specified conditions; and

It further appearing that, even if the proposed plan of reorganization were materially modified so as to meet substantially the objections interposed herein, nevertheless the parties who have consented to the proposed plan and who have petitioned this court to approve the same would ultimately be able, under the laws of the State of California, through the creation of a series of corporations, and through the consolidation thereof, to procure the effectuation of the proposed plan of reorganization, that is to say, assuming that all of the assets of said Union Rock Company were to be transferred to a new corporation, also that all of the issued stock of such new corporation were to be issued to the holders of said Union Rock Company bonds, also assuming that all of the assets of

said Consumers Rock and Gravel Company were to be transferred to a second corporation, also that all of the issued stock of the second corporation were to be issued to the holders of said Consumers Rock and Gravel Company bonds, and assuming that for the purpose and inconsideration of avoiding the prosecution of an appeal from an order approving a plan of reorganization which provided for the transfer of assets and the issuance of stock in the manner herein mentioned, and also for the further purpose and in consideration of avoiding litigation between the debtor corporation and its subsidiary companies and the stockholders of the debtor corporation, a third corporation were to be organized to which third corporation all of the assets of the two new corporations and also all of the assets of the debtor corporation wereto be transferred, upon terms and conditions providing for the issuance of bonds and stock exactly in accord with the issuance of securities as provided under the proposed plan of reorganization, such ultimate consolidation could be effected under the laws of the State of California even against the opposition of the parties herein objecting to the proposed plan of reorganization; and

It further appearing that, with the exception of said two objecting bondholders, all interested parties who have made their views known to the court are convinced that the proposed plan of reorganization is fair, equitable and feasible as to all parties affected thereby; and It further appearing that the offer of the proposed plan of reorganization and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act;

THE COURT CONCLUDES that said proposed plan of reorganization is fair, just and equitable, that the same does not violate any provision of the Constitution of the United States, that the exceptions to the report of the special master should be denied and said report should be approved and that said plan of reorganization should be confirmed.

Counsel for the proponents of the plan of reorganization are requested to prepare and serve findings and decree in conformity with this memorandum.

See:

In the Matter of 620 Church St, etc. et al, 299 US 24

Warner Bros. Pictures, Inc. et al v. Lawton-Byrne Bruner Ins. Agency Co. 79 F (2d) 804

In re Central Funding Corporation, 75 F (2d) 256 Campbell v. Alleghany Corporation, 75 F (2d) 947

In re Georgian Hotel Corporation, 82 F (2d) 917.

In re 333 North Michigan Ave. Bldg. Corp. 84 F (2d)

[Endorsed]: Filed R. S. Zimmerman, Clerk at 25 min past 10 o'clock Aug. 8, 1938 A. M. By M. J. Sommer Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of CONSOLIDATED ROCK PROD-UCTS CO., a Delaware corporation.) In Proceedings. Debtor. * for the ... UNION ROCK COMPANY, a) Reorganization corporation, of a Subsidiary, Corporation -No. 25816-H and CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation, : Subsidiary.

FINDINGS AND ORDER CONFIRMING PLAN OF REORGANIZATION OF CONSOLIDATED ROCK PRODUCTS CO., UNION ROCK COMPANY, AND CONSUMERS ROCK & GRAVEL COMPANY, INC.

The Plan of Reorganization of Consolidated Rock Products Co., Union Rock Company, a Delaware corporation, and Consumers Rock & Gravel Company, Inc., a Delaware corporation, dated March 15, 1937 (hereinafter referred to as the "Plan"), came on for proposal, consideration and confirmation on November 1st, 1937 at 2:00 o'clock P. M., the time set for hearing thereon.

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Within ten (10) days prior to said date objections to said Plan of Reorganization and the confirmation thereof had been filed by Edward E. Hatch and Louis Van Gelder as a subcommittee of the stockholders' committee of preferred stockholders; E. S. Williams as an owner of bonds of said Union Rock Company and E. Blois duBois as an owner of bonds of said Union Rock Company and the said Consumers Rock & Gravel Company, Inc. The objections of said E. S. Williams went to the constitutionality of the Plan. By order dated November 2, 1937, the -petition for proposal, consideration and confirmation of said. Plan of Reorganization and the objections to said Plan were referred to Frank P. Doherty as Special Master under instructions that starting November 8, 1937 he hear said petition of proponents of the Plan and all matters in connection therewith, including any and all objections to said Plan, other than as to its constitutionality, and make his findings and report with respect to all thereof. Under said order the objectors to the Plan and the proponents of the Plan were given a specified time within which to file briefs with the Court on the question of constitutionality. Hearings were conducted before said Special Master pursuant to said order of November 2, 1937, on November 8, 9, 10, 12, 15, 16 and 17, 1937. On December 21, 1937 the Court heard the arguments of all counsel present on the question of constitutionality of the Plan. The Special Mastér's findings and report were filed February 14, 1938. Said objector, E. Blois duBois, filed exceptions to said Special Master's findings and report on March 5, 1938. The hearing thereon was set for March 7, 1938 before this Court. On March 7, 1938 the Court heard arguments by all counsel present on the exceptions to the findings and report of the Special Master and at the conclusion of said arguments took the entire matter,

including the question of constitutionality of the Plan and the approval of the Special Master's findings and report, under submission. Under date of July 22, 1938 said objector, E. Blois duBois, filed a motion to reopen the hearing with respect to confirmation of the Plan. Hearing on said motion took place before this Court on August 5, 1938 at which time all counsel present were heard on said motion. At the conclusion of said arguments said motion was denied.

The Court and said Special Master having heard and examined the evidence, both oral and documentary, submitted by objectors and proponents, having examined all of the briefs filed in these proceedings, having heard arguments of all counsel who desired to be heard and being fully advised in the premises:

THE COURT HEREB: FINDS:

- (1) WITH RESPECT TO THE HISTORY OF THE DEBTOR AND ITS SUBSIDIARIES:
- (a) That Consolidated Rock Products Co., the debtor, was organized under the laws of the State of Delaware, on January 28, 1939; for the purpose of acquiring the issued and outstanding capital stock of the three major companies and their subsidiary and related companies engaged in the business of mining, processing, shipping and selling rock, sand and gravel in Southern California, said three companies being Union Rock Company, a Delaware corporation, Consumers Rock & Gravel Company, Inc., a Delaware corporation and Reliance Rock Company, a Delaware corporation.
- (b) That said Ur on Rock Company and said Reliance Rock Company had prior to the formation of Consolidated

Rock Products Co. entered into a merger agreement which was in the process of completion.

- (c) That Consolidated Rock Products Co. acquired, either directly or indirectly, with the exception of a few shares, all of the issued and outstanding capital stock of said three companies pursuant to a permit from the Division of Corporations of the State of California and in compliance with the Corporate Securities Act of said State.
- (d) That the stock of said three companies was acquired by said Consolidated Rock Products Co. from underwriters consisting of various brokerage firms in and around Los Angeles to which it issued in exchange for said stock 280,000 shares of its preferred capital stock and approximately 396,000 shares of its common capital stock and that said underwriters in turn sold said stock of Consolidated Rock Products Co. to the public and thereby acquired the funds with which to pay for the stock of said three companies.
- (e) That the sums so obtained from the public aggregated approximately \$7,000,000.00 and that in addition thereto Consolidated Rock Products Co. sold 20,000 shares of its preferred capital stock for the sum of \$500,000.00 in order to provide said corporation with working capital; that the total amount of stock issued by Consolidated Rock Products Co. for all purposes aggregated approximately 300,000 shares of preferred stock without par value, carrying liquidation preference of \$25,00 per share and a dividend rate of \$1.75 per share, and approximately 400,000 shares of common capital stock without par value and that the stock sold to the public was sold pursuant, to a permit from the Division of Corporations of the State of California and in compliance with the Corporate Securities Act of said State, in units of two shares of said

preferred and one share of said common for \$58.00 per unit.

- three companies by Consolidated Rock Products Co. said Union Rock Company had outstanding First Mortgage Serial and Sinking Fund Gold Bonds in the amount of approximately \$2,400,000.00 and Consumers Rock & Gravel Company, Inc. had First Mortgage Sinking Fund Gold Bonds outstanding in the amount of approximately \$1,500,000.00, there being no bonded indebtedness against the properties of said Reliance Rock Company.
- (g) That said First Mortgage Bonds were unaffected by the aforesaid acquisition of stock and remained first liens against the properties described in the respective indentures.
- (h) That at the time of the acquisition of the stock of said three companies by said Consolidated Rock Products Co. said three companies did over seventy-five per cent of the rock, sand and gravel business in Southern California, these companies having fee and leased rock, gravel and sand deposits as well as plants and bunkers located at strategic points from Santa Barbara County on the north to San Diego County on the south and as far east as San Bernardino and that said three companies at that time owned in excess of 2,000 acres of deposits in fee, leased approximately 3,000 acres and operated as their own some 200 motor trucks adapted to this particular type of business.
- (i) That at the time of the acquisition of the stock of said three companies there was a vast market for their products; these properties were appraised by the J. G. White Engineering Corporation of New York in the spring of 1928 at approximately \$15,000,000.00, thus, with sub-

sequently acquired properties, bringing under one control properties of an appraised value at the time of acquisition, in excess of \$16,000,000.00 and that under the consolidation with resulting economies of operation and production and the elimination of duplicated facilities, estimated earnings showed an annual profit of \$500,000.00 a year after payment of all charges, including bond interest and preferred dividends.

(j) That shortly after the acquisition of the stock of said three companies by Consolidated Rock Products Co. and while it directly or indirectly owned and controlled all of the issued and outstanding stock of each of them and designated their respective Boards of Directors and officers, it entered into what was termed an operating agreement with these three wholly owned subsidiaries; that said operating agreement was dated July 15, 1929 but effective as of April 1, 1929; that under said agreement said three companies ceased all operating functions and the entire management and operation and financing of the business and properties of the three companies were undertaken by Consolidated Rock Products Co.; that under said agreement all cash, securities, notes, bills and accounts receivable, book accounts, manufactured materials and materials in process, as well as contracts for the sale of materials of said companies, were to be transferred to-Consolidated Rock Products Co.; that in the balance sheets of Consolidated Rock Products Co., after the execution of said agreement, separate balance sheets were kept for said subsidiaries but said Consolidated Rock Products Co. showed on its consolidated balance sheet the profits and loss from the operations of the three companies and Consolidated Rock Products Co. as a unit and therein set up accountings between the parent and its subsidiary companies in accordance with the provisions of said agreement basing depreciation, depletion and amortization on the original valuations given the assets at the time of the acquisition of the stock of said three companies and that said operating agreement contained the express provision that it was not made for the benefit of any third person, parties to the agreement alone being permitted to exercise and enjoy the rights and privileges thereof.

- (k) That under date of February 16, 1933 Consolidated Rock Products Co. entered into a further agreement with its said subsidiaries modifying said operating agreement dated July 15, 1929, materially altering the depreciation item, it apparently being the purpose of this modifying agreement to have the depreciation calculated on a basis consistent with then existing values, preserve the separate corporate entities for purposes of accounting and income tax and in order not to violate provisions of the trust indentures securing the bond issues of said Union Rock Company and said Consumers Rock & Gravel Company, Inc.
- (1) That when Consolidated Rock Products Co. acquired the stock of said three companies said Union Rock Company owned in fee more than twice as much acreage as did Consumers Rock & Gravel Company, Inc. and in addition thereto had a large number of well located distributing bunkers, most of which were owned in fee; that almost immediately after Consolidated Rock Products Co. acquired the stock of said three companies the 1929 depression started; that building activity went to extremely low levels; that the volume of business and prices for products were such that the Company was un-

able to operate its properties at a profit; that competing companies entered the field with the result that from transacting approximately seventy-five per cent of the total business in Southern California, Consolidated Rock Products Co. gradually was able to obtain little more than one-third of the total tonnage in its market; that as a result of curtailed production the management of the Company deemed it advisable to operate leased properties rather than fee properties where both were in the same marketing area because the leased properties called for minimum rents and toyalties whether the plants on these properties were operated or not; that as a result, in the main, of this factor the plants of said Consumers Rock & Gravel Company, Inc. (it having the greatest number of plants on leased properties). were operated and many of the Union Rock Company plants (most of which were located on fee property) were permitted to lie idle and that as a result of this operating procedure the plants of Consumers Rock & Gravel Company, Inc. were better maintained and, during recent years, produced the most tonnage and consequently, the major portion of the total gross income.

- (2) WITH RESPECT TO THE VALUE OF THE PROPERTIES OF THE DEBTOR AND ITS SUBSIDIARIES AND THE APPRAISAL THEREOF:
- (a) That as of the early part of 1929, based principally on the appraisal of the J. G. White Engineering Corporation of New York, the properties had a value in excess of \$16,000,000.00.

- (b) That as of May 1, 1931 because of the disastrous depression resulting in the tremendous drop in available business, Consolidated Rock Products Co. had its properties and those of its subsidiaries reappraised by W. P. Jeffries and Carl Wittenberg, a director and officer of the corporation, respectively; that under their appraisal, referred to in the records of the debtor as the Jeffries-Wittenberg Appraisal, the assets of the debtor and its subsidiaries, exclusive of going concern, good will and current assets, were appraised at \$4,414,425.00.
- (c) That at the hearing before the Special Master the valuation of tangible assets of the three companies, testified to by Robert Mitchell and Frank Gautier, who had had wide experience covering a period of approximately fifteen years in the rock, sand and gravel business and who were thoroughly acquainted with the assets owned by all of the companies, were substantially the same, though they differed as to details, being approximately \$4,300,000.00.
- (d) That according to the appraisal of Thomas C. Rogers who is now a competitor and has been in the rock, sand and gravel business for more than fifteen years and was one of the original owners of said Union Rock Company, the value of the assets of said three subsidiaries operated as a unit is approximately \$3,300,000.00 and that he did not testify as to the value of the assets owned by Consolidated Rock Products Co. or the value of its good will.

- (3) WITH RESPECT TO TREATMENT OF THE HOLDERS OF THE PREFERRED AND COMMON CAPITAL STOCK OF CONSOLIDATED ROCK PRODUCTS CO. AND THE FIRST MORTGAGE BONDS OF SAID UNION ROCK COMPANY AND SAID CONSUMERS ROCK & GRAVEL COMPANY, INC., SINCE MARCH 1, 1929:
- (a) That no dividends of any kind have ever been declared or paid on any of the common capital stock of said Consolidated Rock Products Co.
 - (b) That with the exception of five quarterly dividends no dividends have ever been declared or paid on the preferred stock of said Consolidated Rock Products Co.
- (c) That at the time of the acquisition of the stock of said Union Rock Company and said Consumers Rock & Gravel Company, Inc. by Consolidated Rock Products Co. there were outstanding against the properties of said two subsidiaries first mortgage bonds as follows: Union Rock Company approximately \$2,400,000.00 par value, Consumers Rock & Gravel Company, Inc. approximately \$1,500,000.00 par value, and that said first mortgage bonds bore interest at the rate of six per cent (6%) per armum, payable semiannually.
- (d) That as of May 24, 1935 when the debtors' petitions were originally approved said Consolidated Rock Products Co. had retired first mortgage bonds of Union Rock Company of the par value of \$443,500.00 and first mortgage bonds of said Consumers Rock & Gravel Company, Inc. of the par value of \$299,500.00; that as of said date there were outstanding (I) \$1,979,500.00 of said Union bonds, \$102,500.00 of which were owned by Consolidated Rock Products Co., leaving \$1,877,000.00 in principal amount thereof in the hands of the public and

(II) \$1,200,500.00 in principal amount of said Consumers bonds, \$63,500.00 par value of which were owned by Consolidated Rock Products Co. leaving \$1,137,000.00 par value thereof in the hands of the public.

- (e) That the first interest default on said Union bonds was March 1, 1934 and has continued to date; that the first default on the serial maturities of the said Union bonds was September 1, 1933, and has continued to date; that the first interest default on said Consumers bonds was July 1, 1934 and has continued to date; that the first default in the sinking fund payments on said Consumers bonds was July 1, 1934 and has continued to date and that as of April 1, 1937, the date from which interest will accrue on the new bonds to be issued under the Pian, the delinquent interest on the said Union and the said Consumers bonds held by the public aggregated \$405,-661.67 and \$221,715.00, respectively.
- (4) WITH RESPECT TO THE PRESENT PHY-SICAL SITUATION OF THE PROPERTIES OF CONSOLIDATED ROCK PRODUCTS CO. AND ITS SUBSIDIARIES:
- (a) That since the early part of 1929, and as originally contemplated and as permitted in said operating agreement, all of the business and properties of the debtor and its subsidiaries have been operated, handled and used as hough there had been an actual consolidation of all there-of under one ownership.
- (b) That as a result of said unified operation it would be physically impossible to determine and segregate with my degree of accuracy or fairness properties which originally belonged to the companies separately; that in many instances plants, trucks and other equipment consisting

of machinery and parts originally belonging to the companies separately are now physically joined together as piece of operating equipment; that trucks and other equipment originally belonging to one of the companies have been traded in on new equipment now owned by Cosolidated Rock Products Co. and that cash, accounts receivable and materials of every character and description have been commingled and are now in the main held be Consolidated without any way of ascertaining what partificant thereof, belongs to each or any of the companies separately.

- (5) WITH RESPECT TO FLUCTUATION OF EARNINGS:
- not only upon tonnage sold but also upon prices received that there have been repeated price wars in the industry and that while the volume of available business is a very important factor the price at which the commodities at sold is of equal importance and is variable and subject decided fluctuation.
- (6) WITH RESPECT TO THE CONSOLIDATE OPERATING PROFIT (BEFORE BOND INTEREST, DEPRECIATION, DEPLETION, AMORTIZATION, ETC.) JUST PRIOR TO AND DURING THE PENDENCY OF THESE PROCEEDINGS:
- (a) That for the year 1934 the tonnage was 874,334.9 with an operating profit of \$21,420.90.
- (b) That for the year 1935 the tonnage was 1,111 617.34 with an operating profit of \$49,092.51.
- (c) That for the year 1936 the tonnage was 2,300 258.97 with an operating profit of \$201,632.29.

- (d) That for the year 1937 the tonnage was 2,630,727 with an operating profit of \$291,480.99.
- (c) That for the first six months of the year 1938 the tonnage was 1,243,763 with an operating profit of \$195,-660.77.

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(f) That certain economies of operation which have resulted from these proceedings and will result from the reorganization have aided and will continue to aid in a larger operating profit and that the showing for the first six months of 1938 in no way forecasts continued profit to that extent in the future, it being clearly demonstrated by the records of the debtor and its subsidiaries in the past that the price of its commodities has fluctuated from time to time and has not been maintained at high levels over any extended period of time.

(7) WITH RESPECT TO THE EVOLVEMENT OF THE PLAN OF REORGANIZATION:

- (a) That after the debtor and its subsidiaries filed their petitions herein the representatives of the bondholders of said Union Rock Company and said Consumers Rock & Gravel Company, Inc. and the representatives of the stockholders of Consolidated Rock Products Co. formed themselves into committees and groups, each acting independently of the other and each claiming that its group should be most favorably treated.
- (b) That it was the contention of the representatives of the said Union Rock Company bondholders that the properties of the said Union Rock Company were the most valuable and desirable and that it owned the largest acreage in fee simple, as well as the largest number of bunkers located strategically.

- (c) That it was the contention of the representatives of the Consumers Rock & Gravel Company, Inc. bondholders that said Consumers Rock & Gravel Company, Inc. properties had contributed the major portion of total gross income; were in much better operating condition and that it was to their advantage to have the properties of said Consumers Rock & Gravel Company, Inc. segregated from those of the other companies.
 - (d) That is was the contention of the Consolidated Rock Products Co. stockholders' representatives that the stockholders had contributed some \$7,000,000.00 to the enterprise; that because of the consolidation the bondholders received interest and sinking fund payments for a much longer period than they otherwise would have done and that Consolidated Rock Products Co. had unencumbered assets and good will to a value in excess of \$1,000,000.00.
 - (e) That negotiations with respect to Plans of Reorganization proceeded at frequent intervals over a period of approximately three years during which time considerable bitterness developed between the disagreeing and adverse groups and that these disagreements resulted in the development of several different Plans of Reorganization.
 - (f) That after threats of litigation which might destroy the remaining value to all of the security holders and efforts on the part of all three of the warring factions to compromise as far as possible, the present Plan of Reorganization was evolved.
 - (g) That at the hearing before the Special Master all parties with the exception of witness Rogers testified that they favored continued operation as a unit.

- (8) WITH RESPECT TO THE SOLVENCY OF CONSOLIDATED ROCK PRODUCTS CO. AND ITS SUBSIDIARIES, SAID UNION ROCK COMPANY AND SAID CONSUMERS ROCK & GRAVEL COMPANY, INC.:
- (a) That the present fair value of all of the assets of all of said companies, including "going concern" and "good will" value, are insufficient and inadequate to pay the face value of the said first mortgage bonds plus all accrued interest and the liquidation preferences upon the preferred capital stock of Consolidated Rock Products Co., including accrued dividends thereon.
- (b) That the present fair value of all of the assets admittedly subject to the Trust Indenture securing said first mortgage bonds of said Union Rock Company is insufficient to pay the par value of the bonds, plus accrued interest, as provided by said Trust Indentures.
- (c) That the present fair value of all of the assets admittedly subject to the Trust Indenture securing said first mortgage bonds of said Consumers Rock & Gravel Company, Inc. is insufficient to pay the par value of the bonds, plus accrued interest, as provided by the Trust Indentures.
- of all of said companies, exclusive of "going concern" and "good will" value, if operated as a unit, is in excess of the total bonded indebtedness, plus accrued and unpaid interest thereon up to April 1, 1937, the date of the new bonds to be issued under the Plan of Reorganization.

(9) WITH RESPECT TO THE OBJECTIONS:

- (a) Of Edward E. Hatch and Louis Van Gelder as a subcommittee of the stockholders' committee of preferred stockholders:
- A. That said objections have heretofore been withdrawn.

(b) Of E. S. Williams:

A. That the objections to the constitutionality of the Plan and to constitutionality of said Section 77-B, insofar as said Section 77-B authorizes a Plan such as the Plan here involved, are without merit and that the Plan is constitutional in all respects.

(c) Of E. Blois duBois:

- A. That said objector is the owner of \$150,000.00 par value of said Union Rock Company bonds and \$31,500.00 par value of Consumers Rock & Gravel Company, Inc. bonds.
- B. That of the \$150,000.00 par value of said Union Rock Company bonds owned by said objector \$72,000.00 were acquired between September 20, 1934 and May 8, 1935 and \$78,000.00 between June 5, 1935 and December 9, 1935 and that the Consumers Rock & Gravel Company, Inc. bonds owned by said objector were acquired between July 1, 1934 and April 17, 1935.
- C. That the said Union Rock Company bonds owned by said objector were acquired at an average cost of \$145.00 per \$1000.00 of par value and the said Consumers Rock & Gravel Company, Inc. bonds at an average cost of \$210.00 per \$1000.00 of par value.

- D. That the objection to the giving of the stockholders of Consolidated Rock Products Co. participation in the Plan is without merit for the reasons in this order found and particularly because:
- I. The value of the assets of the debtor and its subsidiaries is in excess of the principal and accrued interest due to all bondholders and, therefore, the stockholders have an equity;
- II. Any alleged liability under the operating agreement was not made for the benefit of any third parties and the bondholders are included in that catagory:
- III. The unmortgaged assets of the debtor which are to be turned over to the new corporation and which are to be subject to the proposed new indenture, constitute a valuable contribution to the new corporation.
- E. That the objection that the bondholders are to receive new bonds only to the extent of one-half of the principal of their present bonds is without merit because:
- I. The present debt structure of the debtor and its subsidiaries is top-heavy and its continuance would subject the debtor to continuing defaults under the trust indenture and embarrass the proposed new company in obtaining necessary banking and trade credit;
- II. The issuance of preferred stock for the other onehalf, having a liquidation preference equal to one-half of the present bond principal, will preserve the relative priority of the bondholders present position.
- F. That the objection that the Plan fails to provide for the discharge or for recognition of the interest, accrued and unpaid, on the present bonds, and the objection that the common stock purchase warrants be attached to the new preferred stock which is to go to the bondholders

does not compensate them for loss of the accrued interest of their present bonds are without merit for the reasons in this order found and particularly because:

- I. Consolidated Rock Products Co. is agreeing to cancel approximately \$165,000.00 in principal amount of present bonds owned by it;
- II. Consolidated Rock Products Co's, tangible assets having a present value of approximately \$500,000.00 and which are not subject to the lien of the present indentures will be subject to the lien of the indenture securing the new bonds and the security of the new bondholders will be increased to this extent;
- III. The preferred stock which the new bondholders are to receive will carry warrants entitling the holders to purchase common stock of the new company for a period of five (5) years, thus giving bondholders an option to acquire a portion of whatever equity may develop in the properties;
- IV. Even if the bondholders had immediately foreclosed and owned the properties since the first default there would have been no earnings from which to pay this accrued interest.
- G. That the objection that the Plan provides that unsecured creditors will have their claims assumed by the new company and thus, in effect, prefer such creditors to the present bondholders is without merit because:
- I. Neither said Union Rock Company nor said Consumers Rock & Gravel Company, Inc. has any unsecured creditors;
- II. Consolidated Rock Products Co. has no unsecured creditors except current trade accounts incurred during the course of the reorganization proceeding; and

- III. It is essential to the continuance of the business that the current trade accounts be paid currently and be maffected by the Plan.
- H. That the objection that the rights of minority bondholders may be prejudiced by the provision in the Plan that the indenture to secure the new bonds will provide that it may be amended with the consent of seventy-five per cent (75%) of the new bonds is without merit because:
- 1. Any such amendment would also require the consent of the Trustee under the new indenture;
- II. This provision for the amendment of bond indentures is customarily inserted in order to permit modification if necessary without the expense of a formal reorganization proceeding;
- 'III. It is a provision which has been consistently approved by the California Corporation Commissioner; and
- IV. Under Section 77-B of the Bankruptcy Act of 1898, as amended, the rights of bondholders are always subject to modification with the consent of sixty-six and two-thirds per cent (66-2/3%) of the bondholders and the approval of the Court.
- I. That the objection that the common stockholders of Consolidated Rock Products Co. are offered the right to subscribe to new common stock at a price lower than that offered to the new bouldholders under the common stock purchase warrants to be attached to the preferred stock is without merit because:
- I. Said common stockholders have a right only for a period of three (3) months to purchase one (1) share of the new common stock at \$1.00 per share for each five (5) shares of their present common stock;

- II. Expense and delay of litigation may be avoided by giving the present common stockholders some participation in the Plan;
- III. Such subscription right if made attractive may provide a means for raising new capital for the new company without prejudicing the prior position of the bondholders and the preferred stockholders;
- IV. The warrants of the new bondholders extend for a period of five (5) years and the warrants going to the new bondholders are in addition to the new bonds and the new preferred stock while the subscription rights given to the present common stockholders are in lieu of any other rights which they may have or claim to have.
- J. That the objection that the Plan appears to allocate all net income of the new company to the servicing of the new bonds and new preferred stock, but yet actually permits the use of net income for general corporate purposes prior to such servicing is without merit because:
- I. The properties involved constitute an industrial enterprise with varying needs for capital outlays; the business of the new company is one of a decidedly fluctuating character and some latitude must be given to keep the new company with adequate working capital rather than to have all of such funds used for servicing the new bonds and the new preferred stock; and
- II. The interests of the new bondholders are safeguarded in that any diversion of net income from the servicing of the new bonds and preferred stock requires the vote of a majority of the directors of the new company to be selected by the present bondholders.
- K. That the objection that Article XI of the Plan contemplates placing the present bondholders in a junior

position by providing that the new company may raise money through a loan to be secured by a lien superior to the new bond indenture is without merit because:

- 1. The Plan provides that any such loan can be made only with the approval of the Court and is limited to \$150,000.00;
- II. It can be secured by a prior lien only on the present assets of Consolidated Rock Products Co. and they are not subject to the present indentures; and
- III. It is impossible to estimate the expense of reorganization or the capital needs of the new company and this method of providing for such needs is advisable.
- L. That the objection that Section 2 of Article VI of the Plan permits the said Union Bondholders' Committee and the said Consumers Bondholders' Committee to authorize liens prior to those offered to the new bondholders is without merit because:
- I. There may be some unforeseen and trivial matter which affects title to some of the properties and which could not be approved were it not for this provision; and
- II. The said bondholders' committees would not—and probably could not—approve anything which would substantially impair the security of the new bonds.
- M. That the objection that the definition of "net income" in the Plan is unfair in permitting the deduction from gross income of expenses of alterations, improvements and additions prior to the application of income to servicing the new bonds and the new preferred stock, and in permitting the directors to deduct from gross income such amounts as they deem necessary to maintain adequate working capital is without merit for the reasons hereinbefore set forth in Subdivision J of this Paragraph (9)

- (c) and because if the bondholders had foreclosed and were operating the properties, their interests would be subject to the same discretionary power of their representatives in the conduct of the business.
- N. The objection that Section 7 of Article VI of the Plan leaves to the discretion of the board of the new company the determination of what constitutes "available net income" for application to the new bonds and new preferred stock is without merit for the reasons set forth in Subdivision J and M of this Paragraph (9) (c).
- O. That the objection that the events of default under the new bond indenture (Section 10 of Article VI of the Plan) are unduly lenient to the new company is without merit for the reasons in this order found and particularly because:
- I. The present stockholders of Consolidated Rock Products Co. were unwilling to subject the Consolidated Rock Products Co's. assets to the new bond indenture unless the default provisions were lenient;
- II. The new bondholders will receive all of the available net income as provided in the Plan;
- III. If the minimum interest payments described in Article VIII of the Plan are not made, the voting control of the new company will become vested in the new preferred stockholders and they will thus have substantially all the advantages which they would have in the event of foreclosure—this provision with respect to change of control being more favorable to the bondholders than the provision concerning defaults;
- IV. On reorganization bond issues it is the policy of the California Corporation Commissioner to favor lenient.

lefault provisions in order to avoid the necessity of sub-

Pro That the objection that Section 11 of Article VI of the Plan permits proceeds from sales or condemnation of property to be diverted to other than bond retirement is without merit for the same reasons as are hereinabove et forth in Subdivision J of this Paragraph (9)(c).

- Q. That the objection that the voting trust agreements referred to in Article IX of the Plan insure control if the new corporation in the hands of the same management which is responsible for the present condition of the companies is without merit because:
- I. The voting trusts referred to by the objector apply ally to the new preferred stock which goes to the present union and Consumers bondholders who obviously do not control the management of the present company; and
- II. The voting trust provision is made optional so nat any bondholder who does not wish to subject his new referred stock to a voting trust need not do so.
- R. That the objection that no provision is made by thich Consolidated Rock Products Co. shall contribute to be new company any excess indebtedness over and above it principal amount of the present bonds of said Union and said Consumers is without merit for the reasons in its order found and particularly because:
- I. Consolidated Rock Products Co. has never assumed to said bonds;
- II. Even though the bonds had been assumed by the onsolidated Rock Products Co. the bondholders would be entitled to more than their principal and interest,

and the value of the present assets of all the companies, including good will, is in excess thereof; and

- III. Under the Plan all of the assets of all the companies, including those of Consolidated Rock Products Co., are to be subjected to the lien of the new indenture, and thus the present bondholders will obtain the benefit of all of the assets which they could have obtained by foreclosure, assuming that all of such assets were subject to the lien or claim under the two present bond indentures.
- S. That the objection that Section 11 of Article VI of the Plan will permit the new corporation to purchase its bonds in the open market with income which should be applied to the discharge of the bonded debt is without merit because:
- I. Such purchase of bonds in the open market will result in the discharge of the debt represented by the bonds so purchased.
- II. Such purchase of bonds in the open market would necessarily be at prices less than the redemption price and thereby retire a larger amount of debt than would be done by redemption; and
- III. Such a provision is customary even in original issues of bonds, a similar provision being in the two existing indentures herein involved.
- T. That the objection that the division of income of the new company in equal portions between the bondholders of said Union Rock Company and said Consumers Rock & Gravel Company, Inc. is unfair to said Union bondholders in that it is not proportionate to the ratio of

the outstanding Union and Consumers bonds is without merit for the reasons in this order found and particularly because:

- I. This provision is the result of a compromise of a highly disputed point between the committees representing the said bond issues;
- II. The said Consumers properties had been contributing the major portion of the gross income of the consolidated companies and are generally in better operating condition; and
- III. The application of the proceeds of the sale of nonoperating properties of all the companies to the retirement of bonds and preferred stock having the lower market value, as provided in the Plan, will tend to equalize the two series of new bonds and new preferred stock to a point where the number outstanding or the market value thereof is approximately the same.
- U. That the objection that no independent appraisal has been made is without merit for the reasons found in this order and particularly because:
- I. There has been such a commingling of the assets and properties, including the funds from the sale of stock of Consolidated Rock Products Co., that an appraisal would be of no value to the Court and would be of such an indefinite and unsatisfactory nature as to produce further confusion.
- II. A separate independent appraisal would result in unnecessary and great delay and expense to all parties and its benefits would be highly problematical;
- III. The appraisal of the properties under the Jeffries-Wittenberg Appraisal; by Robert Mitchell; by Frank

Gautier and by Thomas C. Rogers, each independent of the other, show the valuations substantially the same though arrived at on different bases.

IV. There is no evidence that the Plan of Reorganization has dealt unfairly or inequitably with any of the security holders.

V. It maintains the relative priorities as between bond-holders and stockholders and due to the long period of negotiations it is probable that the interested parties would disagree and litigate if there was any substantial change from the present Plan.

V. That the objections to the constitutionality of the Plan and to the constitutionality of said Section 77-B, insofar as said Section 77-B authorizes a Plan such as the Plan here involved, are without merit and that the Plan is constitutional in all respects.

- (d) That there were no objections to the Plan filed by any interested party or parties except by said Hatch and Van Gelder; said Williams and said duBois.
- (10) WITH RESPECT TO THE PROPOSAL OF THE PLAN OF FEORGANIZATION:
- (a) That the said Plan of Reorganization dated March 15, 1937 has been duly proposed in the manner prescribed in subdivision (d) of Section 77-B of the Bankruptcy Act of the United States, as amended (hereinafter called 772B) and a copy of said Plan has been duly filed herein.

- (11) WITH RESPECT TO NOTICES CONCERNING THE PLAN AND ITS CONSIDERATION:
- (a) That all notices of the hearing of November 1, 1937, as required by the order in this proceeding dated October 1, 1937, were duly served, mailed and published within the requisite time and in the requisite form as more particularly appears from the affidavits with respect thereto on file herein.
- (b) That all notices of the hearing of November 7, 1937 and subsequent dates before the Special Master, as required by the order in this proceeding dated November 2, 1937, were duly served, mailed and published within the requisite time and in the requisite form as more particularly appears from the affidavits with respect thereto on file herein.
- (c) That all notices of the filing of the Special Master's findings and report and of the hearing on approval thereof on March 7, 1938, were duly served, mailed and published within the requisite time and in the requisite form as more particularly appears from the affidavits with respect thereto on file herein.
- (12) WITH RESPECT TO THE FILING OF SCHEDULES:
- (a) That pursuant to the orders of Court entered herein the debtor and its said subsidiaries have filed herein such schedules and have submitted herein such other information as is necessary to disclose the conduct of the debtor's and its subsidiaries' affairs and the fairness of the Plan.

- (13) WITH RESPECT TO THE CLASSIFICATION OF CREDITORS AND STOCKHOLDERS OF THE DEBTOR AND ITS SUBSIDIARIES:
- (a) That by order of this Court heretofore entered herein the Court has fixed and determined the reasonable time within which the claims and interests of creditors and stockholders might be filed or evidenced and allowed and for the purpose of the Plan and its acceptance the creditors and stockholders of the debtor and its subsidiaries are divided into the following classes according to the nature of their respective claims and interests:
 - A. Consolidated Rock Products Co.
- I. Holders of 285,947 shares of preferred stock, without par value;
- II. Holders of 397,455 shares of common stock, without par value;
 - B. Union Rock Company
- 'I. Holders of \$1,979,500.00 principal amount of First Mortgage Serial and Sinking Fund Gold Bonds;
 - II. 160,000 shares of Class "A" capital stock;
 - III. 400,000 shares of 'Class "B" capital stock;
 - C. Consumers Rock & Grayel Company, Inc.
- I. Holders of \$1,200,500.00 principal amount of First Mortgage Sinking Fund Gold Bonds;
 - II. Holders of 120,328 shares of common capital stock.
- (b) That reasonable notice of the order in subdivision,
 (a) hereof mentioned has been given to creditors and stockholders by publication and otherwise, all in accordance with the provisions of said order.

- (14) WITH RESPECT TO ACCEPTANCE OF THE PLAN:
- (a) That the Plan has been accepted in writing and acceptances thereof have been duly filed in these proceedings, all in accordance with the provisions of subdivision (e), clause 1 of Section 77-B, by or on behalf of creditors of the debtor and its subsidiaries holding more than two-thirds in amount of the claims of each class whose claims have been allowed and will be affected by the Plan, namely, claims of the holders of First Mortgage Serial and Sinking Fund Gold Bonds of said Union Rock Company, and holders of First Mortgage Sinking Fund Gold Bonds of said Consumers Rock & Gravel Company, Inc., and by and on behalf of the stockholders of the debtor and its subsidiaries of each class holding more than a majority of the stock of such class.
- (b) That the Plan makes provision for the payment of all current creditors and all claims of the United States of America, if any, in cash, in full.
- (c) That with such acceptances statements were filed by the debtor and its subsidiaries, verified in the manner required by this Court, setting forth what contracts of the debtor were executory in whole or in part and what unexpired leases had been rejected and surrendered.
- (d) That by order of the Court entered herein, the Court being satisfied that by reason of the number of securities outstanding and the extent of public dealing therein, the preparation of such a statement would be impractical, debtor and its subsidiaries were directed that they need not file a statement showing what, if any, claims and shares of stock had been purchased or transferred by those accepting the Plan after the commencement or in contemplation of the proceedings.

THE COURT IS SATISFIED:

- (1) That the Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders of the debtor and its subsidiaries, and is feasible.
- (2) That the Plan complies with the provisions of subdivision (b) of Section 77-P of the Bankruptcy Act of 1898, as amended,
- (3) That the Plan has been accepted as required by the provisions of subdivision (e), clause (1) of said Section 77-B.
- (4) That neither the debtor nor either of its subsidiaries is a utility subject to the jurisdiction of any regulatory commission or commissions, or other regulatory authority or authorities created by the laws of the State in which its properties are operated.
- (5) That all amounts to be paid by the debtor or its said subsidiaries or by any corporation acquiring the assets of the debtor or its subsidiaries, and all amounts to be paid to committees or reorganization managers, whether or not by the debtor or its said subsidiaries or any such corporation, for services or expenses incident to the reorganization, have been fully disclosed and are reasonable or are subject to the approval of the Judge upon a showing to be hereafter made.
- (6) That the offer of said Plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by said Bankruptcy Act.
- (7) That the new corporation referred to in the Plan will be authorized by its charter or by applicable state or federal laws, on confirmation of the Plan, to take all action necessary to carry out the Plan.

The Court being satisfied in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

- (1) That the petitions filed herein by the debtor and its subsidiaries on May 24, 1935 were filed in good faith and contained statements of all matters required to be stated in such petitions and that the debtor and its subsidiaries are entitled to the relief therein prayed for and that this Court has exclusive jurisdiction of the debtor and its subsidiaries and the properties of each of them.
- (2) That the findings and report of the Special Master dated February 11, 1938 and filed herein February 14, 1938 are hereby confirmed and approved in all particulars.
- (3) That other than Consolidated Rock Products Co. as the owner of the stock of said subsidiaries, the only creditors and stockholders of debtor whose interests will be affected by the Plan and the only claims or interests which shall be allowed as claims or interests adversely affected by the Plan are as follows:
- * (a) Holders of 285,947 shares of preferred stock, without par value, of Consolidated Rock Products Co.
- (b) Holders of 397,455 shares of common stock of Consolidated Rock Products Co., without par value.
- (c) Holders of \$1,979,500.00 principal amount, of First Mortgage Serial and Sinking Fund Gold Bonds of said Union Rock Company.
- (d) Holders of \$1,200,500:00 principal amount, of First Mortgage Sinking Fund Gold Bonds of said Consumers Rock and Gravel Company, Inc.
- (4) That the acceptances of the Plan filed in this proceeding by or on behalf of each class of creditors and stockholders of the debtor and its subsidiaries are in the

requisite amounts and the manner of accepting the Plan by all those who have filed acceptances thereof in this proceeding are hereby approved.

- (5) That the Plan is fair and equitable and does not discriminate unfairly against any class of creditors or stockholders and is feasible.
- (6) That the Plan is hereby in all respects approvedand confirmed, subject only to a further showing to be hereafter made to the Court as to the compliance of the new corporation contemplated by the Plan with such applicable laws and regulations as are necessary in order for it to issue its securities and carry out the provisions of the Plan, and that the provisions thereof and of this order shall be binding upon
 - (a) the Debtor
 - (b) the Debtor's subsidiaries
- (c) all stockholders of the debtor and its subsidiaries, including those who have not, as well as those who have accepted the Plan, and
- (d) all creditors of the Debtor and its said subsidiaries, secured or unsecured, whether or not affected by the Plan and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted the Plan
- (7) That the debtor and its subsidiaries and the corporation organized for the purpose of carrying out the Plan shall have full power and authority to, and shall put into effect and carry out the Plan and all orders of this Court relative thereto under and subject to the supervision and control of the Court, and take all steps which may be necessary or proper in that connection, whether or not herein specifically authorized.

- (8) That every issuance, transfer or exchange of securities by this order directed or provided for in the Plan or necessary to be made to carry out the Plan and this order, are all to make effective, and such securities are to be issued, transferred and exchanged pursuant to, the Plan by this order confirmed, under and in accordance with the provisions of said Section 77-B within the meaning of subdivision (f) and subdivision (h) of this Section.
- (9) That all questions, issues, matters and things not. hereby disposed of (including all matters relating to compensation for services rendered and reimbursement for actual and necessary expenses incurred in connection with the Plan by parties in interest, creditors and their representatives, attorneys and agents), and the enforcement of the obligations of the new corporation required to be assumed by it pursuant to the Plan and this order, are hereby reserved by the Court, to the extent not heretofore disposed of, for its future determination, and that any party to this cause, any person who has appeared herein, or the new corporation, may at any time apply to the Court for the enforcement of this order and for further relief, with respect to matters not herein or hereinbefore specifically provided for, and for such purposes the Court hereby reserves jurisdiction of the new corporation and said mortgaged properties to be transferred to it.
- (10) That the debtor and its said subsidiaries, and all creditors and stockholders of and claimants against each of them and their property, and all persons claiming under the debtor and its said subsidiaries, or such creditors, stockholders and claimants, are hereby perpetually enjoined from prosecuting against the new corporation or any nominee, assignee or grantee of the new corporation, or against any party to this cause, or against

any person or corporation claiming under any of them or against said mortgaged properties to be transferred pursuant to this order and the Plan, or any part of said properties, any suit or proceeding arising out of or based upon any obligation or liability of the debtor or its said subsidiaries herein, or any claim, lien or charge with respect to said mortgaged properties or any part thereof or otherwise to impose liability upon the new corporation, or upon its nominees, assignees or grantees, or upon any party to this cause or upon any person or corporation claiming under any of them, or upon said properties, or any part thereof, to be transferred pursuant to this order. except in subordination to this order; provided, however that nothing herein contained shall be deemed to limit or restrict any right granted by or under the Plan or this order.

(11) That within sixty (60) days following the transfer of said properties from the debtor and its said subsidiaries to the new corporation as hereinabove directed the new corporation shall file in this proceeding a report of said transfer and confirmation of the Plan, and shall give notice of such filing to all persons who have appeared in this cause, and that the provisions of any order heretofore entered in this proceeding, which by their terms would prevent the debtor and its said subsidiaries from performing any act required to be performed by it or them pursuant to the terms of the Plan, are hereby modified and amended to permit the debtor and its said subsidiaries to carry out and perform in all respects the terms and provisions of the Plan.

Dated: September 8, 1938.

H. A. Hollzer JUDGE

APPROVED AS TO FORM:

GIBSON, DUNN & CRUTCHER

By T. H. Joyce

Attorneys for Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee

O'MELVENY, TULLER & MYERS By Graham L. Sterling, Jr.

Attorneys for Urion Rock Company Bondholders' Protective Committee

MOTT, VALLEE & GRANT By Kenneth E. Grant

Attorneys for E. Blois duBois, Objector to Plan of Reorganization.

Stanley Arndt

Attorney for Objectors Edward E. Hatch and Louis Van Gelder as Members of Subcommittee on Plan of Reorganization of the Stockholders' Committee

LATHAM, WATKINS & BOUCHARD By Paul R. Watkins

Attorneys for Debtors.

[Endorsed]: Received Copy of the within Findings & Order this 2nd day of September, 1938. E. S. Williams In Pro Per. Filed R. S. Zimmerman, Clerk at 20 min. past 10 o'clock Sep - 8 1938 A. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

AGREED STATEMENT OF THE CASE

IT IS HEREBY STIPULATED AND AGREED by and between (a) E. BLOIS DUBOIS, objector to the plan of reorganization of Consolidated Rock Products Co., Union Rock Company, and Consumers Rock & Gravel Company, Inc., and appellant herein, by his attorneys of record herein, John G. Mott, Paul Vallee and Kenneth E. Grant; (b) F. B. BADGLEY, COL. R. E. FRITH, T. FENTON KNIGHT and WALTER S. TAYLOR, comprising the Union Rock Company Bondholders' Protective Committee (hereinafter called the "Union Committee"), by their attorneys of record herein, Messrs. O'Melveny, Tuller & Myers, Homer I. Mitchell and Graham L. Sterling, Ir.; (c) WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY, ALFRED GINOUX and GUY WITTER, comprising the Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee (hereinafter called the "Consumers Committee"), by their attorneys of record herein, Messrs. Gibson, Dunn & Crutcher and Thomas H. Joyce; (d) EDWARD E. HATCH and LOUIS VAN GELDER, comprising the Consolidated Rock Products Co. Preferred Stockholders' Committee (hereinafter called the "Preferred Stockholders' Committee"), by their attorney of record, Stanley Arndt; and (e) CONSOLIDATED ROCK PRODUCTS CO., the Debtor herein (hereinafter called "Consolidated"), by its attorneys of record, Messrs. Latham, Watkins & Bouchard and Paul R. Watkins, that the following, including the documents incorporated by reference in Paragraph 14 hereof, shall constitute an agreed statement of the case:

- 1. On May 24, 1935, Consolidated and its whollyowned subsidiaries, Union Rock Company (hereinafter called "Union") and Consumers Rock & Gravel Company, Inc. (hereinafter called "Consumers"); filed herein their respective petitions for relief under Section 77B of the Bankruptcy Act of 1898 as theretofore amended and then in effect. Said petitions were duly and regularly filed and contained allegations proper and necessary to confer jurisdiction upon the court herein. No admission or allegation was made by said corporations, or any of them, that their assets amounted to less than their liabilities, but allegations were made that their assets had a value in excess of the amount which could be realized at that time upon a sale thereof or upon liquidation, and that if said corporations were not reorganized, the rights and interests of their creditors and stockholders would be seriously impaired; and allegations were likewise made that said corporations were unable to meet their debts as they matured and that they desired to effect a plan of reorganization pursuant to said Section 77B.
- 2. On May 24, 1935, the court herein made and entered its orders respectively approving said petitions of Consolidated, Consumers and Union for relief as properly filed under said Section 77B, and directing that Consolidated be permitted to remain in possession of its properties and those of its said subsidiaries, and fixing the time and place of the hearing and prescribing the notice to be given thereof upon the questions as to whether or not the Debtor's possession of said properties should be continued or a trustee or trustees thereof appointed. On July 2,

1935, after said hearing held on June 24, 1935, the court made and entered its order continuing the Debtor in possession of said properties, subject to the terms and conditions of said order.

3. On February 19, 1936, T. C. Rogers, for and on behalf of himself and other bondholders holding obligations of Union, filed his petition herein for the appointment of a trustee to take possession of the properties of the Debtor and to manage and operate the same. In said petition and affidavits filed by said T. C. Rogers in support thereof, said T. C. Rogers alleged, among other things, that whereas at the time of the acquisition of Union by Consolidated in 1928, Union had ten plants that were in good working condition, at the date of said petition in 1936. the Debtor had so operated said properties that there was only one Union plant which was immediately available for the production of rock; and that the Consumers plants, lands and equipment were then in good, proper and working order. Said petition of T. C. Rogers was referred by the court to Frank P. Doherty as Special Master; and after hearing held on the same, said petition was denied on the ground that no sufficient showing had been made that the properties were not being operated and managed as efficiently as possible by the Debtor through its vice president, Frank Gautier, and its vice president and secretary, Robert Mitchell, who by virtue of an understanding between Consolidated, the Union Committee and t'le Consumers Committee were acting as co-managers of the properties and the business, both of said persons having had many years of experience in the rock and gravel business, and said Gautier having been an officer or employee of Consumers. and said Mitchell having been an officer or employee of

Union prior to their acquisition by Consolidated in 1928, and both having been closely associated with the consolidated business since 1928.

4. On June 1, 1936, the Consumers Committee filed its petition herein setting forth a proposed plan of reorganization involving the segregation and separate operation of the Consumers properties for the sole benefit of Consumers bondholders, alleging that said committee had on deposit approximately 56% of the outstanding Consumers bonds and that Consumers was insolvent, and seeking, among other things, the appointment of a trustee of Consumers properties, the reference to a special master of the segregation and identification of properties subject to the indenture securing the Consumers bonds, the evaluation of the Consumers properties, the termination of the Operating Agreement of July 15, 1929, between Consolidated and its subsidiaries, the rescission of the purported modification dated February 16, 1933, of said Operating Agreement, and rendering of an account between Consolidated and Consumers, and the allowance of a claim in favor of Consumers against Consolidated based on the alleged commingling of Consumers assets by Consolidated and the possession, use and management thereof by Consolidated. on the termination of said Operating Agreement, and an accounting the eunder and/or on the basis of the intercompany accounts as between Consolidated and Consumers. Thereafter the Consumers Committee submitted to all known bondholders of Consumers said proposed plan of reorganization involving the segregation and separate operation, in a new corporation to be formed for that purpose, of all of the properties of Consumers for the sole benefit of Consumers bondholders; and as a result of such

submission, the holders of more than two-thirds in amount of the outstanding Consumers bonds either deposited their bonds with the Consumers Committee or otherwise accepted and approved said proposed plan of reorganization.

- 5. Immediately after the filing of said proposed plan of reorganization by the Consumers Committee, the Union Committee and Consolidated recommenced negotiations with the Consumers Committee looking toward the formulation of a plan of reorganization which would be acceptable to Consolidated, the Consumers Committee and the Union Committee and which would preserve the properties and business of Consolidated and its subsidiaries as an operating unit. Such negotiations resulted in the abandonment of said plan of reorganization by Consumers and in the adoption by the Consumers Committee, the Union Committee and Consolidated of the plan of reorganization dated March 15, 1937, finally proposed by said committees and Consolidated and finally confirmed herein on September 8, 1938.
- 6. At the hearing on November 1, 1937, before the above entitled court on the confirmation of said plan of reorganization dated March 15, 1937, the court made its order filed herein on November 3, 1937, referring said plan of reorganization and the objections thereto (except objections going to constitutionality) to Frank P. Doherty, Special Master; and after the conclusion of the hearing before the Special Master, said Special Master filed his Findings and Report herein on February 14, 1938. All of the exhibits referred to in or filed with said Findings and Report of the Special Master were admitted in evidence by the Special Master.

- 7. All of the statements and findings contained in the Findings and Report of Special Master, Frank P. Doherty filed herein on February 14, 1938, are supported by sufficient evidence, except those portions thereof specified in the exceptions and supplemental exceptions of E. Blois duBois to said Findings and Report, and also in Paragraphs XI to XVIII, both inclusive, of said appellant's Assignment of Errors filed on October 8, 1938, in the United States Circuit Court of Appeals for the Ninth Circuit, about which there is dispute. Appellant contends that said portions of the Findings and Report of the Special Master are not supported by evidence, and appellees contend that said portions are supported by sufficient evidence.
- 8. At the inception of the hearing before Frank P. Doherty as Special Master on the confirmation of said plan of reorganization dated March 15, 1937, motion was made. by counsel for said duBois for appointment by the Special Master of appraisers to report to the Special Master the value of the various interests involved in said plan, and particularly the value of the property securing the outstanding bonds of Union, the value of the property securing the outstanding bonds of Consumers, and the value of the properties proposed to be contributed by Consolidated to the new company referred to in said plan. Like motion was made by counsel for the Preferred Stockholders' Committee, but was withdrawn at the end of the hearing by counsel for the Preferred Stockholders' Committee for the reasons stated by him, that he and his committee had become convinced by the evidence, first, that an appraisal would be of no aid to anyone and would merely delay matters and entail large unnecessary expense, and second, that the total values as testified to by Mr. Mitchell, Mr. Gautier

and Mr. Rogers were so near together that he and his committee would accept the average of their total values as the true valuation. Motion was also made by counsel for said duBois for the appointment of an auditor or auditors to examine the books of all the companies involved in said plan and report to the Special Master the indebtedness of Consolidated to Union and Consumers under said Operating Agreement of July 15, 1929, and the purported modification thereof dated February 16, 1933. Decision on each of said motions was deferred by the Special Master until the taking of evidence was completed, and at the completion of the hearing both said motions were renewed by counsel for duBois and taken under submission by the Master.

9. The following evidence was adduced at said hearing before the Special Master on the confirmation of said plan of reorganization of March 15, 1937, with respect to those portions of the Findings and Report of the Special Master filed herein on February 14, 1938, referred to in Paragraph 7 hereof:

(a) GRAHAM L. STERLING, JR.,

a witness on behalf of the proponents of said plan of reorganization of March 15, 1937, testified as follows:

"I am a member of the law firm of O'Melveny, Tuller & Myers, attorneys for the Union Committee, and am actively in charge of the services rendered by said firm to said committee. Shortly after the commencement of this proceeding and the formation of the bondholders' committees, negotiations at arm's length were undertaken between the Union Committee, the Consumers Committee and Consolidated in an effort to work out a plan of reor-

ganization that would be fair and acceptable to the three groups of security holders whose interests were in many respects conflicting. These negotiations, which commenced in the spring of 1935, had been particularly difficult because of the position of the Consumers Committee that the Consumers properties were worth more than the Union properties, in that they were in better operating condition and actually had contributed and were contributing a larger portion of the earnings of the combined properties. The Union Committee was reluctant to accede to that position, contending that the Union properties were worth more than the Consumers properties and that the value was the approximate ratio of the respective amounts of outstanding bonds of the two companies. These negotiations broke down in the spring of 1936, and in June 1936 the Consumers Committee filed its own independent plan of reorganization seeking a segregation of the Consumers properties in a separate corporation to be formed for that purpose, the securities of which would be distributed only to Consumers bondholders. The Consumers Committee was successful in obtaining the approval of its said plan by holders of more than two-thirds of the outstanding Con-Thereafter, the Union Committee, being sumer bonds. satisfied that the properties of the companies involved had been so operated as a unit and that there had been such a commingling of the properties that any attempt at segregation would involve prolonged litigation and the probable destruction of the business, reopened negotiations with the Consumers Committee and Consolidated which extended over a period of several months and culminated in the agreement of the Union Committee and the Consumers

Committee and Consolidated on the plan of reorganization of March 15, 1937, which was finally confirmed. Said plan of reorganization of March 15, 1937, represented a bona fide compromise of the conflicting viewpoints of the two bondholders' committees and Consolidated. The Consumers Committee had argued that since the Consumers properties were contributing approximately 60% of the earnings of the Consumers and Union properties as a whole, 60% of the income should be applied to the servicing of the new Consumers bonds. The Union Committee had argued that since the Union bonds represented approximately 60% of the total bonded debt of Union and Consumers, and the properties probably had a value in the same ratio, 60% of the income should be applied to servicing the new Union bonds. The essence of the compromise on this disputed point was that although there should be no difference between the new Union bonds and the new Consumers bonds as to lien, the income available for the servicing of the new bonds should be divided, instead of 60-40 in favor of Consumers or 40-60 in favor of Union, on a 50-50 basis between the two series of new bonds.

"The Union Committee had often considered the desirability of obtaining an outside, detailed appraisal of all of the assets of the various companies, but had concluded:

(1) that the commingling of machinery and equipment of the companies during nine years of operation as a unit made it practically impossible to obtain appraisals of each of the properties separately; and (2) that being satisfied from their own investigations that the properties as a whole, on a fair going concern valuation, were undoubtedly worth more than the claims on the outstanding bonds of the two subsidiaries, this fact alone would justify participation by Consolidated stockholders in any joint plan of reorganiza-

tion, and there was, therefore, ho need of going to the expense and delay entailed by an outside appraisal. As to the assets of Consolidated not under the Union or Consumers bond indentures, Mr. Mitchell and Mr. Gautier, the operating men in charge of the companies, placed on them a value in excess of \$500,000. We had reason to believe these estimates were made honestly and in good faith and represented as nearly the truth as any other estimate.

"The Union Committee had not overlooked the possibility that the subsidiaries of Consolidated might each have a cause of action against Consolidated under the Operating Agreement between Consolidated and its subsidiaries, and that the bondholders of the subsidiaries might acquire these causes of action in the event of a foreclosure, and that by this means 'the subsidiaries' bondholders might be able to have applied to their claims whatever, if anything, could be realized by a prosecution of these causes of action against Consolidated even though Consolidated had not expressly assumed liability for the payment of its subsidiaries' bonds. Even under such facts, nothing would be available to the bondholders until after foreclosure and sale and after the prosecution to final judgment, including possible appeals, of the causes of action against Consolidated. By the time separate foreclosures were prosecuted, the business of all of the companies would be disrupted, and by the time the causes of action against Consolidated were prosecuted, Consolidated might have little or nothing with which to satisfy any judgments that might be obtained. Such a course would result in substantial injury to the bondholders' security. In conferences with attorneys for Consolidated, the latter had asserted various defenses to any such causes of

(Testimony of Graham L. Sterling, Jr.)

action under the Operating Agreement, pointing out that (1) when the subsidiaries' bonds had been issued, they were not subsidiaries of Consolidated but independent companies separately owned, and that the Operating Agreement had not been executed until several years later, after Consolidated had been organized and had acquired all of the stock of Union and Consumers, thus making them wholly-owned subsidiaries of Consolidated; (2) the Operating Agreement, being made between a parent and its wholly-owned subsidiaries and expressly providing that it was not made for the benefit of any third party, was in effect an agreement between Consolidated and itself and could therefore be terminated, and all liability thereunder extinguished, by action of the parent or its subsidiaries at will; (3) the benefits derived by the subsidiaries from their joint operation by Consolidated under the Operating Agreement exceeded any detriment which might thereby have been caused the subsidiaries, and thus on a final balancing of the accounts between Consolidated and its subsidiaries under the Operating Agreement it might well be ultimately established that the subsidiaries were indebted to Consolidated instead of Consolidated being indebted to its subsidiaries. I do not recall that it was ever contended that Consolidated had terminated the Operating Agreement. I do not recall that any statements showing the intercompany liabilities under the Operating Agreement were obtained by the bondholders' committees. However, we took steps on behalf of Title Insurance and Trust Company, as trustee under the Union bond indenture, to preserve whatever claim might exist on the Operating Agreement by obtaining extensions of time for the filing of such a claim, With respect to the actual status of financial accounts

(Testimony of Graham L. Sterling, Jr.)

between Consolidated, Consumers and Union, the proponents of the plan proposed it without determining the Mability in dollars and cents. The existence of any liability depends upon determination by a court of an extremely difficult question or questions of law and fact.

"We at no time advised the Union Committee that there was no possibility of liability under the Operating Agreement, but we did advise that, in our opinion as attorneys, the chance of establishing it was extremely remote and would involve a difficult suit. We pointed out that any attempt to enforce any possible cause of action of the subsidiaries against Consolidated would involve protracted litigation and a probable disruption of the business, to the ultimate detriment of the bondholders, and that to determine the fairness of permitting Consolidated stockholders to participate in a joint plan of reorganization, it was only necessary to conclude that the properties and business of all of the companies involved, taken at a fair going business value, exceeded the claims on the subsidiaries' bonds; that if the Union Committee was satisfied that such an excess or equity existed, then participation by Consolidated stockholders would not only be justified but necessary in order to make the plan fair, regardless of the existence of any intercompany liabilities between Consolidated and its subsidiaries. I also pointed out that, on the other hand, if Consolidated was correct in its position that the bondholders could not establish or enforce any liability of Consolidated to its subsidiaries under the Operating Agreement, Consolidated would be contributing to the plan its assets of an estimated value of from \$500,000 to \$700,000, which will be pledged as security for the new bonds, and thus justify participation in the plan by Consolidated stockholders."

(Testimony of Thomas H. Joyce)

THOMAS H. JOYCE,

a witness on behalf of the proponents of said plan of reorganization of March 15, 1937, testified as follows:

"I am a member of the law firm of Gibson, Dunn & Crutcher and have been counsel for the Consumers Committee. Mr. Ginoux, one of the members of the Consumers Committee, made a thorough examination of the properties owned by Consolidated and the two subsidiaries, and made his report to the Committee covering his examination. The Committee members themselves had made field investigations and actually gone out and looked at all the properties. I think that the two San Francisco members of the Consumers Committee had made a survey about one year ago and that Mr. Ginoux made his approximately at that time. These surveys were made prior to the time that the Consumers Committee filed in these proceedings its own separate plan of reorganization in which it was alleged that Consumers was insolvent. I. might add that such allegation was a necessary one. The Consumers Committee's plan sought to remove the properties of that company from the other properties, and also sought appraisal of all properties involved and an accounting under the Operating Agreements. My law firm, as Jegal representative of the committee, had advised that in its opinion there was a possibility of substantial recovery by Consumers against Consolidated under the Operating Agreement of 1929, and the Consumers Committee's plan contemplated use of the proceeds of any such recovery in the future operations of the reorganized Consumers company."

(c) ROBERT MITCHELL,

a witness on behalf of the proponents of said plan of reorganization of March 15, 1937, testified as follows:

"I am vice president and secretary of Consolidated, secretary of Union, and secretary of Consumers. I was formerly an officer of Union, starting with that company upon its organization in 1922, and since the organization of Consolidated in 1929 I have been connected with that company. After Consolidated had been organized and had purchased all of the outstanding stock of Union and Consumers, Consolidated had some \$500,000 of cash working capital left in its treasury from the sale of Consolidated stock to the public, and these moneys were used in the general operations of the properties. Reliance Rock Products Company is a wholly-owned subsidiary of Union. Under the plan of reorganization it will be eliminated as a separate entity, as all of its assets are to be transferred to the new company. The Operating Agreement was entered into in 1929 to permit unified operation of the properties of all the companies, Consolidated taking over all cash, accounts receivable and payable, equipment and inventories of the subsidiary companies, and the subsidiaries thereupon ceasing to operate as going companies, all operations being carried on by Consolidated. In the course of time, as a result of the operations of all of the properties under one management as one business, machinery and equipment owned by the various companies became commingled as the occasion arose. If a Consumers plant became worn out in some respect, equipment would be taken from an idle Union plant and used to replace the worn-out item on the Consumers plant. Wheels from a Consumers truck would be put on a Union truck, for

example, and vice versa. It was-practically impossible to keep track of this intermixing of equipment, and no complete or accurate record was kept. Replacements were, purchased by Consolidated with funds which may have been a part of Consolidated's original \$500,000 of working capital, or proceeds from the operations of a Union or Consumers plant, but no separate record of the source of such funds was kept, since all of the properties and assets of all the companies were in the possession of Consolidated and treated for practical purposes as though they belonged to Consolidated. In 1931 we sold approximately 60% of the total market. In 1937 it would run possibly 40%. In 1929 the earnings were sufficient to cover all bond requirements and necessary reserves, leaving, after all deductions, a profit of \$90,000. In the latter part of 1931 the directors considered the plan of having a reappraisal of the properties. The appraisal was made and submitted to the stockholders, and in October 1931 the value of the assets was feduced and a new stated value given to the capital stock. Stated set value of the preferred stock was \$1,800,000, and a value of \$1 was given to the common. The purpose of that was to feduce the very heavy book reserves that had prior to that time been necessary, so if there were earnings they would be made available for preferred stock dividends. Dividends on the preferred stock of Consolidated were paid only in 1929 and 1931, amounting in the first of the two years to \$262,500 and in the latter year to \$380,625, or a total of \$643,125.

"Complete accounts were kept showing the status of accounts as between Consolidated, Union and Consumers under the Operating Agreement. As of October 31, 1937,

the books of Consolidated reflected a liability by reason of its current accounts with its subsidiaries (not including credits for depreciation, depletion and amortization), due upon termination of the Operating Agreement, of \$745,-722.15, and a liability to the subsidiaries on account of accumulated depreciation, depletion and amortization on subsidiary company properties from April 1, 1929, computed on values shown on the books of the subsidiaries, of \$4,982,166.94, making a total liability of Consolidated to its subsidiaries, as reflected by the books, of \$5,727,939.09. As of the same date the balance sheet of Union showed total claims of Union against Consolidated in the sum of \$3,479,569.17, offset in part by an obligation from this subsidiary to Consolidated on the current account amounting to \$540,707.58. As of the same date the balance sheet of Consumers showed total claims against Consolidated in the sum of \$2,026,821.73, against which the balance sheet reflected no offsetting claim in favor of Consolidated. These entries on the books of Consolidated and the two subsidiaries evidence the status of accounts under the Operating Agreements.

"In 1929, after Consolidated acquired Union and Consumers, the total value of the properties then held as fixed by an appraisal by J. G. White Engineering Corporation of New York was approximately \$15,000,000. When the stated value of stock was reduced in 1931, a revaluation of the properties was made by Mr. Jeffries and Mr. Wittenberg, officers of Consolidated, and the value fixed at \$4,414,425.

"In my opinion, taking the plants as they are and evaluating all properties on a fair going concern value basis, the value of the Union properties is at least

\$1,975,200; of the Consumers properties, at least \$1,267,-100; of the Reliance properties, at least \$175,000; and of the properties of Consolidated, at least \$500,000. Said values do not include Consolidated's net current assets of approximately \$340,000 or any value for its goodwill and trade names, which I estimate at \$500,000."

The balance sheet of Consolidated and its wholly-owned subsidiary companies as of September 30, 1937, was produced by the witness and introduced in evidence as Exhibit 11. Said balance sheet showed total assets of \$3,537,619.60. Current assets of \$680,816.33 were shown, made up as follows: cash \$210,922.01; accounts and notes receivable, trade, rents, claims and other, net after provision for losses and discounts, \$269,565.02; inventories at lower of cost or market \$110,821.66; prepaid items, including insurance and taxes, operating supplies and sundry items, \$89,507.54.

Said balance sheet showed liabilities as follows: current accounts payable, accrued items and miscellaneous, other than bond interest, \$237,779.36; purchase money obligations past due, and payments extended by agreement, payable during and after 1937, \$100,252.96; accrued interest on bonds \$717,976.69, said total figure reflecting accrued interest on the bonds of Union from September 1, 1933, in the sum of \$462,151.69 and on the bonds of Consumers from January 1, 1934, in the sum of \$255,825,

Outstanding bonds of Union appeared in the total amount of \$1,877,000, of which \$273,000 matured on September 1, 1932, \$54,000 on September 1, 1938, and \$1,550,000 to mature between 1939 and 1947.

Said balance sheet, showed outstanding Consumers bonds maturing July 1, 1938, in the amount of \$1,137,000.

Total liabilities shown amounted to \$4,106,216.68, exclusive of capital and surplus liability, with an operating deficit shown for the period from October 1, 1931, less \$18,912.38 paid-in surplus, of \$2,370,598.08, with the result that liabilities shown exceed assets by \$570,597.08.

The witness then produced the balance sheet of Union of March 31, 1929, which was introduced in evidence as Exhibit 14. It showed total current assets of \$621,815.69 against current liabilities of \$194,055.86. Current assets consisted of: cash \$316,153.83; accounts receivable after reserve for discounts and losses \$260,091.70; notes receivable \$399.00; accrued interest \$514.46; inventories of rock and gravel \$44,656.70. Producing lands, leaseholds, bunker sites and miscellaneous land, plants, bunkers, structures, machinery and equipment, automobiles, trucks and trailers were shown at a value of \$8,227,053.86, less reserves for depreciation, depletion and amortization of \$1,582,184.87, reducing the value of such properties to \$6,641,868.99.

Total assets shown amounted to \$9,887,442.11. Total liabilities, capital and surplus, appeared in the same amount, i. e., \$9,887,442.11, of which sum capital stock value was placed at \$2,410,781.45.

The balance sheet of Union Rock Land Company as of March 31, 1929, was produced by the witness and introduced in evidence as Exhibit 16. It showed total assets of \$1,081,475.07. Liabilities, other than capital and surplus, were placed at \$354,674.11, of which \$1,502.23 represented current liabilities against current assets of \$10,814.93.

The balance sheet of Reliance Rock Company as of March 31, 1929, was produced by the witness and intro-

(Testimony of Robert Mitchell)

duced in evidence as Exhibit 18. It showed total assets of \$1,665,061.09, of which \$84,537.63 represented current assets. Lands, plants, equipment, etc., after reserves for depreciation and depletion, were placed at \$1,533,389.60. Total liabilities were placed at \$224,907.49, of which \$210,907.49 represented current liabilities. Capital stock, earned surplus and surplus from revaluation of land appeared in the sum of \$1,440,153,60.

The balance sheet of Builders Crushed Rock Products Co. as of March 31, 1929, was produced by the witness and introduced in evidence as Exhibit 17. It showed total assets of \$308,891.14, of which \$21,266.91 represented current assets. Lands, plants, equipment, etc., after reserves for depreciation and depletion, were placed at \$252,042.77. Current liabilities appeared at \$18,031.41; capital stock, earned surplus, capital surplus and surplus from revaluation of leaseholds, at \$290,859.73.

The balance sheet of Consumers as of March 31, 1929, was produced by the witness and introduced in evidence as Exhibit 15. It showed total current assets of \$521, 176.68, including cash of \$79,415.85. Against current assets there appeared current liabilities of \$386,248.77. Properties, plants, bunkers, machinery, equipment and automotive equipment, after deduction of reserves for depreciation and depletion, were valued at \$4,988,134.66.

The witness produced the baiance sheet of Consolidated and its wholly-owned subsidiaries as of March 31, 1929, and the same was introduced in evidence as Exhibit 20. Lands, deposits, leaseholds, buildings, equipment, autos and trucks, less reserve for depreciation, depletion and amortization, were valued therein at \$13,845,815.70. Total assets appeared in the sum of

\$16,788,214.77, of which current assets were shown in the sum of \$1,333,888.32. Total capital stock and surplus was listed at \$11,594,465.96. Current liabilities appeared in the sum of \$882,751.73.

The witness corrected a tabulation of the acreage contemplated to be contributed by the various companies under the proposed plan of reorganization, which was then received in evidence as Exhibit 21 and showed proposed contributions as follows:

By Union and its subsidiaries:

			Total
	Fee	Lease	. Acres
Plant	. 1639.21 a	icres 461.35 acres	2100.56
Bunkers	40.78	9.40	50.18
Nonoperative	341.11		341.11
	2121.10	470.75	2491.85
By Consum	ers:	ø	
Plant	252.71	acres 919.84 acres	1172.55
Bunkers	4.28	_	4.28
Nonoperative	64.33		64.33
	321.32	919.84	1241.16
By Consolid	ated:		
Plants only	107.30 a	acres 35.00 acres	142.30
By subsidiar	ies with div	ided ownership:	N. See
Plant	2.10 a	acres 20.00 acres	22.10
Bunkers		3.82	6.53
Nonoperative	.20	-	.20
	2.30	23.82	28.83

The witness produced a list of properties owned by Consolidated which are not under the Union or Consumers indentures, and the same was introduced in evidence as Exhibit 19. It showed miscellaneous properties at an original cost of \$860,007.39, which, after deduction on account of depreciation, was shown at a net value as of September 30, 1937, of \$296,465.58. Additional assets not included in such valuation were listed to include 60% of the stock of Sunset Rock Products Company, original cost \$246,383.57; deduction for depreciation \$155,734.86; net value as of September 30, 1937, \$90,648.71; Atlas Mixed Mortar, net value as of September 30, 1937, \$7,524.18.

The witness produced and there was introduced in evidence as Exhibit 29 a summary of all the properties of Consolidated and its wholly-owned subsidiaries, as valued May 1, 1931, under the so-called Jeffries-Wittenberg appraisal, the properties appearing therein as follows:

					,	
	Fee	Fee Land.				*
	Land	(Bunkers	Leased	Improve-	Autos &	
	(Rock)	& Misc.)	Land	ments	Trucks	Total
Atlas				,		
- 0	. 1					
Mixed						7 . 5
Motar				-	• •	
Co.	1	\$ 7,750	:	2,500	\$ 2,900	\$ 13,150.
Builders						
Cr. Rock		**	*			
	3			9 25 000	2 420	
Co.	-	. —	10	35,000	2,420 .	37,420
Consoli-						
dated	7,500	2,500		138,920	85,965	234,945
	15		1	100,720	00,900	204,545.
Con-					9	
sumers	163,050	504,400	_ `	1,067,150	95,535	1,830,135
* * *						1 . 4
Reliance						
Rock Co.	136,600	_	_	180,000	410	317,010
Sunset .				8 .		. 4
Rock P.						
Co.	- 1	2,750	_	75,000	_	77,750
					* .	
Union	466,700	335,450	-	763,140	37,015	1,602,305
	4 4	* *				
Union	• ,*					
Rock				**		
Land						
Co.	140,100	115,310	-	11,500	34,800	301,710
200	-	-				
TOTAL	913,950	968,160		2,273,270	259,045	4,414,425

By stipulation of the parties the witness, Mr. Mitchell, submitted to the Special Master as evidence herein the data appearing in the letter of the witness to the Special Master, dated November 26, 1937, appended to the Report of the Special Master.

The witness produced a tabulation of property valuations of Union (including Union and Builders C. R. P. Co.) and of Consumers, both of November 17, 1937, which was introduced in evidence as Exhibit 27, said exhibit showing values as follows:

Union:

Plants and properties		1,173,000
Bunkers and yards		490,000
Trucks, 52 pieces	2	40,000
Office furniture		2,500
Unimproved real estate		129,000
Union Rock Land		133,700
Builders		7,000
Total		\$1,975,200

Consumers:

Plants		\$1,094,500
Bunkers and yards		55,500
Unimproved real estate		71,600
One-half interest Atlas Morta	r	3,000
Office furniture and equipmer	nt .	2,500
Trucks, 60 pieces	•	40,000
	-	
Total	•	\$1;267,100

The witness read the following tabulation of production and tonnage produced by the various companies respectively from 1931 to September, 1937:

	1931		1932		
	Tons Produced	Percent of Total	Tons Produced	Percent of Total	
Consumers	1,583,265.30	58.09	1,632,021.61	66.44	
Union	909,182.98	33.36	581,484.21	23.67	
Reliance	3,583.65	.13	3,527.34	.14	
Consolidated	229,455.05	8.42	239,370.24	9.75	
Totals	2,725,486.98	100.00	2,456,403.40	100.00	
,	1933	``	. 1934		
44	Tons Produced	Percent of Total	Tons Produced	Percent of Total	
Consumers	974,611.28	50.45	639,152.26	75.66	
Union	861,260.65	44.58	100,356.62	11.87	
Reliance	_		-		
Consolidated	96,011.61	4.97	105,359.17	12.47	
"Totals	1,931,883.54	100.00 °	844,868.05	100.00	
		<i>t</i> o	The state of		
	. 1935	*	1936		
Q.	Tons Produced	Percent of Total	Tons Produced	Percent of Total	
Consumers	841,025.60	78.41	1,399.082.18	63.02	
Union	112,134.75	10.45	567,873.35	25.58	
Reliance Consolidated	119,428.56	11.14	253.168.76	11.40	

(Testimony of Robert Mitchell-Frank Gautier)

1937 (9	Mo's.)		TOTALS FOR ENTIRE PERIOD	
Tons	Percent of Total	Tons Produced	Percent of Total	
1,131,739.99	59.60	8,200,898.22	62.36	
612,832.98	32.27	3,745,125.54	28.48	
-	•	7,110.99	.06	
154,213.18	8.13	1,197,006.57	9.10	
, 1,898,786.15	100.00	13,150,141.32	100.00	
	Tons	Produced of Total 1,131,739.99 59.60 612,832.98 32.27 154,213.18 8.13	Tons—Produced of Total Produced 1,131,739.99 59.60 8,200,898.22 612,832.98 32.27 3,745,125.54 — 7,110.99 154,213.18 8.13 1,197,006.57	

(d) FRANK GAUTIER,

a witness on behalf of the proponents of said plan of reorganization of March 15, 1937, testified as follows:

"I am an executive officer of Consolidated, and with Mr. Mitchell have acted as co-manager of Consolidated and its subsidiaries since the commencement of the reorganization proceeding. For many years prior to the reorganization of Consolidated in 1928, I had been an officer of Consumers and for these reasons I am familiar with all the properties of Consolidated, Union and Consumers. In my opinion, on a fair going concern basis, exclusive of net current assets and goodwill, and taking the plants as they are, the properties of Union are worth at least \$1,750,000, the properties of Consumers are worth at least \$1,436,000, the properties of Reliance are worth at least \$190,000, and the properties of Consolidated are worth at least \$534,000."

(Testimony of T. C. Rogers)

(e) T. C. ROGERS,

a witness on behalf of certain appearing bondholders who neither objected to nor consented to said plan of reorganization of March 15, 1937, testified as follows:

"I was employed by Union for many years prior to the purchase of Union by Consolidated in 1928. I am thoroughly familiar with the properties of both Union and Consumers, having been engaged in the rock business practically all my life. In my opinion the value of the Union properties is far greater than that of Consumers. Union owns in fee a large acreage of the finest rock lands in this section of the country, while the Consumers properties consist largely of leaseholds, with several of its plants and holdings in the San Fernando Valley, which furnishes a type of rock inferior to that of the San Gabriel Valley, where Union has large plants and holdings. Union has in addition fee ownership of bunker sites, for the distribution of rock and other materials, located in strategic points throughout the Los Angeles district. These bunker locations are in practically all the industrial sections, and the sites themselves have very substantial valuations independent of their use for bunker purposes. In my opinion the Union properties could be segregated from the properties of Consumers and Consolidated and operated independently to earn interest on a valuation of \$7,000,000. I would be interested personally in working out some arrangement for the operation of the Union properties if, they were so segregated. These properties can be operated economically without any great amount of new working capital. Operations would not be handicapped by lack of automotive equipment as this is readily available on a

(Testimony of T. C. Rogers-Guy Witter)

rental basis. In fact, in the case of the rock company with which I am now connected, such equipment is frequently obtained on such rental basis. In my opinion the physical properties of Union have a present value of \$2,318,000, the Consumers properties a value of \$750,000, and the Reliance properties a value of \$200,000. These valuations are given on the basis of the operations of all properties as a business unit. In placing the stated value on the Union properties, I do not take into consideration the possibility of oil production from the bunker sites owned in fee by that company, one in the heart of the Wilmington oil district, and one in the heart of the Redondo oil district."

(f) GUY WITTER,

a witness on behalf of the proponents of said plan of reorganization of March 15, 1937, testified as follows:

"I am a member of the investment banking firm of Dean Witter & Co., the principal original underwriter of the Consumers bonds. At the time the Consumers bonds were underwritten and sold to the public, Consumers was an independent operating company with no affiliation or connection with Union. In fact, Union was one of the principal and most bitter competitors of Consumers. After the occurrence of defaults under the indenture securing the Consumers bonds, my firm organized the Consumers Committee, of which I am chairman. I endeavored to secure the services, as members of the Consumers Committee, of Consumers bondholders who were best qualified to serve the interests of the Consumers bondholders as a class. My firm and I had always been of the opinion that the Consumers bonds were better secured than the Union

(Testimony of Guy Witter)

bonds, and that opinion had been reflected by the fact that Consumers bonds during the past four or five years con-· sistently sold on the open market at higher prices than the Union bonds. The other members of the Consumers Committee and I, after investigating the condition of the properties, concluded that the Consumers properties were in better operating condition than the Union properties; and the figures showed that the Consumers properties were contributing more income to the consolidated business. For these reasons the Consumers Committee always felt that in any joint plan of reorganization, Consumers bondholders should receive somewhat better treatment than Union bondholders. It was this view which prompted the Consumers Committee to propose their separate plan of reorganization in June 1936 involving a segregation of the Consumers properties for the sole benefit of the Consumers bondholders. Said plan was ultimately accepted by the holders of more than two-thirds of the Consumers bonds, and the Consumers Committee was sincere and bona fide in their statements that they intended to consummate that plan unless a joint plan satisfactory to Consumers could be worked out. The negotiations conducted between the Consumers Committee Union Committee and Consolidated have always been at arm's length, and it was only with great reluctance that a majority of the members of the Consumers Committee finally agreed to accept the plan of reorganization of March 15, 1937. As a matter of fact, one member of the Consumers Committee, holding a substantial amount of Consumers bonds;

(Testimony of Guy Witter-T. Fenton Knight)

was so opposed to the plan of reorganization of March 15, 1937, as not being sufficiently favorable to the Consumers bonds that he did not personally accept the plan until several months after the other members of the Consumers Committee had accepted the plan and submitted it to the Consumers bondholders.

"I am aware that the petition filed with the court seeking separate reorganization of Consumers alone alleged insolvency of that company and that such allegation was made by the committee after its investigation of the company's holdings. In my opinion Union was then in worse condition.

"The average holding of Consumers bonds was approximately \$3,000 in principal amount."

(g) T. FENTON KNIGHT,

a witness on behalf of the proponents of said plan of, reorganization of March 15, 1937, testified as follows:

"I am a member and secretary of the Union Committee. I have been engaged in the investment business for many years, and since 1932 have specialized in reorganization work. The Union Committee was organized by E. H. Rollins & Sons Incorporated, the original underwriter of the Union bonds. Said firm had endeavored to select as members of the Union Committee representative Union bondholders with investment experience and sound business judgment. The members of the Union Committee had no interest except to work out the best plan of re-

(Testimony of T. Fenton Knight)

organization possible for the Union bondholders. In negotiating with the Consumers Committee, the Union Committee was faced with the fact that for a number of reasons (which did not necessarily reflect any discredit on the business judgment of the previous Consolidated managements) Consolidated had during the past ten years kept the Consumers plants in better operating condition han the Union plants; that although Union had a much greater area in fee acreage than Consumers, much of such acreage had no further utility in the company's business, and it having been practically impossible to dispose of this acreage due to the fact that the Union bond indenture did not permit release of lands during the pendency of a default, the result was that no matter what the potential value of the Union lands might be, their present value to the going business was probably not as great proportionately as the value of the Consumers plants. Although the plan of reorganization of March 15, 1937, was a compromise plan, I believe that it is essentially a fair plan under all the circumstances, and certainly preferable from the standpoint of the Union bondholders to any other plan or solution which could be worked out. . I believe that the provisions of the plan permitting the liquidation of nonoperating properties and application of the proceeds to bond retirement would shortly result in an equalization of the amounts of the two series of new bonds, and this factor largely offsets any disadvantage to the Union bondholders arising from the provision of

(Testimony of T. Fenton Knight)

the plan that 50% of the net income of the new company should be used to service the securities going to the Consumers bondholders. I sincerely believe that if the plan of reorganization of March 15, 1937, should be upset or refused confirmation, the Consumers Committee would proceed with the foreclosure of the Consumers bonds and that the resulting dismemberment of the consolidated properties would result in great loss to the Union bondholders.

"The Union Bondholders' Protective Agreement provides: 'The Committee may compensate E. H. Rollins & Sons Incorporated for services in soliciting the deposit of bonds hereunder at a rate not exceeding \$5.00 per \$1,000 principal amount of deposited bonds.' The Committee has not yet reached any decision as to whether or not Rollins should be compensated to any extent. In any event any such compensation will be subject to court approval just as is any other expense of reorganization.

"The largest single holder of Union bonds consenting to the plan was Consolidated, holding \$102,500 in principal amount of bonds. The next largest holders consenting held respectively \$30,000, \$22,000, \$18,000, \$15,000, \$14,000, \$12,000, \$10,000 and \$10,000. There are about 650 bondholders, the average holding between \$2,500 and \$3,000 in principal amount.

"Excluding the consent of Consolidated to the plan as the holder of \$102,500 of bonds, the plan was consented to by 67.26% of Union bondholders."

(h) E. BLOIS duBOIS,

testifying in objection to the plan by stipulation of evidence in his absence, testified as follows:

"I own and hold Union bonds dated as of December 1, 1927, in the principal amount of \$150,000, \$10,000 of which became due and payable September 1, 1933, \$1,000 September 1, 1934, and \$16,000 September 1, 1937. I also own and hold Consumers bonds dated June 1, 1928, in the principal amount of \$31,500. All of the Consumers bonds were purchased between July 1, 1934, and April 17, 1935, prior to the filing of any petition for reorganization under Section 77B of the Bankruptcy Act. Said bonds were acquired from time to time over that period. Union bonds in the principal amount of \$72,000 were purchased between September 20, 1934, and May 8, 1935, also prior to the filing of any petition for reorganization. The balance of Union bonds, i. e., \$78,000 in principal amount, were purchased from time to time between June 5, 1935, and December 9, 1935.

"All of said bonds were purchased by me as an investment and after my studies of economic conditions, and particularly conditions surrounding the building industry, had convinced me that bonds of companies supplying building materials to the building trade afforded a good opportunity for investment. I was convinced from my (Testimony of E. Blois duBols)

studies of conditions affecting the building industry throughout the United States, and particularly in Southern California, that the slump in building activity which commenced about 1927, or prior thereto, and continued into 1932 and 1933, would be followed by a period of increased building activity. My purchases were further dictated by my conviction that a building boom would undoubtedly occur in Southern California, and particularly in the Los Angeles area because of the phenomenal development in growth of said section. Prior to the filing of any petition for reorganization, I conferred with Mr. Buckbee and Mr. Gautier, officers of Consolidated, and was told by them that they believed the Consumers and Union bonds afforded good investment possibilities and that they figured that as soon as the volume of business picked up they would be able to pay off all interest and possibly the principal of the outstanding bonds, and that because of the nature of the building material business it would be possible in one good year alone to discharge all the outstanding bonds of said company. None of my bonds were acquired for purposes of speculation. I have never sold any of the bonds and never purchased any of them with the idea of taking advantage of market fluctuations.

"The average cost to me of my Union bonds was \$145 oper \$1,000 of principal amount, and the cost to me of my Consumers bonds was \$210 for each \$1,000 of principal amount."

(Testimony of Henry Chase)

(i) HENRY CHASE,

a witness on behalf of the objector, E. Blois duBois, and also on behalf of bondholders appearing but neither objecting nor consenting, testified as follows:

"I was for many years prior to organization of Consolidated connected with Union as an accountant. After formation of Consolidated I became connected with that company in the same capacity and for several years had supervision of its accounting department.

"Prior to 1933 I had several conversations with executive officers of Consolidated with respect to accruing liabilities in favor of Union and Consumers under the Operating Agreement of 1929. These officers were concerned with the mounting liability, and in particular that arising from the item of depreciation, depletion and amortization of the properties of the subsidiary companies. It advised them that the accounts were being kept in strict conformity with the provisions of the Operating Agreement."

10. There was produced and introduced in evidence as Exhibit 12 to the Special Master's Report a copy of the Union bond indenture entered into as of September 1, 1927, between that company and Title Insurance and Trust Company, trustee, said indenture conveying to the trustee, as security for the bonds, all the fee and leasehold property of the company, together with all buildings, improvements, plants and structures then or thereafter placed or constructed upon said real property. Also conveyed to the trustee was:

"All furniture; equipment, fixtures, machinery, boilers, engines, drills, tools (including, among others, hand tools), automobiles, trucks and road vehicles, rails, tracks, locomotives, cars, steam shovels, derricks, implements and appliances now upon the above described real property (including, as aforesaid, leaseholds) or any part thereof, or belonging to the Company and used in or for or in connection with the production and/or mahufacture and/or sale and/or transportation of rock, gravel and/or sand, or which hereafter may be acquired by the Company and be used in or for or in connection with the production and/or manufacture and/or sale and/or transportation of rock, gravel and/or sand, or which hereafter may be placed upon the above described real property (including, as aforesaid, leaseholds) or any part thereof and be owned by the Company and be used in or for or in connection with the production and/or manufacture and/or sale and/or transportation of rock, gravel and/or sand, together with all renewals, replacements and substitutions of or for such furniture, equipment, fixtures, machinery, boilers, engines, drills, tools (including among others, hand tools), automobiles, trucks and road vehicles, rails, tracks, locomotives, cars, steam shovels, derricks, implements and appliances as aforesaid, or any thereof."

By Paragraph IX of said bond indenture there was also conveyed to the trustee the following:

"All other property and estate of the Company, real, personal and mixed, whatever and wherever situate and whether now owned or hereafter acquired, it being expressly understood and agreed that this indenture shall and does cover and affect all property now owned and/or ereafter acquired by the Company to the same extent and to all intents and purposes as though all such property were herein particularly described."

default and entry into possession of the trust estate by the trustee or receiver, "then and thereupon there shall accrue to and became a part of the trust estate and of the security hereunder and be and become subject to the lien of this indenture, all cash of the company then on hand or in bank, securities, including stocks, bonds, debentures and other evidences of interest in or ownership of property or of obligations owned by others, notes and bills and accounts receivable, book accounts, manufactured materials, and materials in process, raw materials not in place, supplies, choses in action and contracts for the sale

of materials at that time belonging to the company, together with all right, title, interest and claim of the company therein and thereto, all of which *** the trustee or any receiver *** may take into possession and hold and collect *** as part of the trust estate ***."

There was also produced and introduced into evidence as Exhibit 13 to the Special Master's Report the Consumers bond indenture dated July 1, 1928, entered into by that company and Bank of America National Trust and Savings Association, as trustee, said indenture conveying to said trustee all the fee and leasehold property of the company, together with all buildings, improvements, plants and structures then or thereafter placed or constructed upon the real property. Said indenture likewise contains the identical additional provisions embodied in the Union bond indenture above stated.

11. Attached to this Agreed Statement of the Case, marked Exhibit A and made a part hereof is a copy of the letter dated June 4, 1936, mailed by Consolidated to all known holders of Consumers bonds shortly after the Consumers Committee had filed its plan calling for a separation of the Consumers properties for the sole benefit of Consumers bondholders. The "Consolidated plan" referred to in said letter is a plan which had been theretofore filed by Consolidated without the approval of either the Consumers Committee or the Union Committee. It was later abandoned and is not elsewhere referred to in this Agreed Statement of the Case.

[Ехнівіт А.]

CONSOLIDATED ROCK PRODUCTS CO. LOS ANGELES, CALIF.

Telephone ADams 3111 General Offices

2730 South Alameda Street

June 4, 1936.

To the Bondholders of Consumers Rock & Gravel Company, Inc.:

You are respectfully requested to read this letter-fully and carefully. It is as brief as the importance of the matter will permit.

Under date of February 1st, 1936, we wrote you asking that you take no steps which would preclude you from approving a plan presented by the company. We also advised you that we would send a copy of the Consolidated plan for your approval after it was filed. It is enclosed herewith.

The Consolidated plan was filed on April 8th of this year. It was not sent to you out of deference to the Consumers Bondholders' Committee in the hope that that committee would be agreeable to a discussion of re-organization of the company as a unit. However, that has not resulted and under date of May 1st, 1936, that committee sent you an outline of the Consolidated plan, criticized it and stated that a plan would soon be presented by the committee which would better protect your interests. That plan was filed on June 1st, 1936. In brief it provides as follows:

(1) That the properties of Consumers will be segregated and separated from Consolidated.

- (2) That a new corporation will be organized to take over the present assets of Consumers.
- (3) That the new corporation will issue new general mortgage, 5% income bonds in the amount of \$1,200,500.00 and 4801 shares of capital stock without par value.
- (4) That the new bonds will be issued to the present bondholders of Consumers par for par.
- (5) That 2401 shares of the new stock will be issued to voting trustees for the benefit of the holders of the new bonds. The voting trustees will be the present members of the Consumers Bondholders' Committee.
- (6) That 2400 shares of the new stock may be issued to provide working capital "or in connection with any employment contract or contracts which may be entered into between the new corporation and such person or persons as shall undertake the general management thereof."
- (7) The 5% interest on the bonds shall be non-cumulative for approximately four and one-half years and the interest shall only be paid if earned.
- (8) Working capital up to \$250,000.00 shall be provided either through enforcement of the alleged liability of Consolidated to Consumers under the operating agreement or through borrowings which may be secured by a lien prior to that securing the new bonds.

Before we comment on this plan we deem it advisable to give you a brief background of the consolidation. Consolidated was organized in 1929. Its preferred and common stock were sold to the public. It acquired all of the outstanding stock of Consumers Rock & Gravel Company, Inc., Union Rock Company, and Reliance Rock Company, all Delaware corporations. The then stockholders of Consumers were paid \$3,600,000.00 in cash for their stock. The Consumers assets were then subject to your bond issue of approximately \$1,500,000.00. The purpose of the consolidation was to consolidate these three major companies under one operating unit. The expected result was the elimination of duplications in overhead and the elimination of what had then been cut-throat competition between these companies. The stockholders of Consolidated put some eight or ten million dollars into Consolidated stock. The stock market crash occurred within a few months after the consolidation was completed. Since that time and continuously up to the middle of 1935, the volume of available tonnage has declined rapidly. The common stockholders of Consolidated have never received a dividend. The preferred stockholders' dividends ceased in June 1930. Consolidated continued to pay interest and sinking fund requirements on your bonds until January of 1934. Since the consolidation, Consolidated has retired \$299,500.00 of Consumers bonds in addition to the interest payments. Had it not been for the consolidation and the money of the Consolidated stockholders, your bonds would have been in default in 1930. Any untrased person familiar with this business will confirm this statement. For the three months of 1929 preceding the consolidation Consumers' income tax return showed a net loss, before bond interest, of \$84,500.00.

When the volume of business was continually decreasing it became necessary to temporarily abandon certain plants and concentrate operation n others. may have been made to you that the Consumers plants have been operated and kept up continuously while the Union had not, and that the reason for so doing was that the Consumers plants were more valuable. It is true that more of the major plants of Consumers were operating. However, the reason is simple and sound. The major Consumers plants, with one exception, are on leased properties which require the payment of large minimum rents and royalties. Many of the Union plants are on property owned in fee where the only carrying charges are taxes. Obviously the Consumers plants-where minimum royalties had to be paid—were the ones to be operated. This was done and accounts for the fact that during the bottom of the depression the Consumers plants were more actively in operation and sold more tonnage than the Union. With the up-turn in business, which started in the middle of 1935 and has since continued, Union plants are now being revamped and placed in active operation. In the past three months two of these have been completely overhauled and are now actively operating. The operation of the Consumers plants during the low period did not impair your security. There is sufficient rock, sand and gravel on these properties to last indefinitely. The plants have been well maintained and it is indisputable that they could not have all been maintained and operated had Consumers not been a part of Consolidated.

We request that you carefully consider the following comments with respect to the Committee's plan:

(1) This would mean a breaking down of the present consolidation into two or perhaps even three companies.

The net result of that would be an immediate and long drawn out competitive war for volume of business at any price. Competition in the rock, sand and gravel business is perhaps its greatest problem. The companies as a unit can meet competition with a united front and obviously with greatly reduced operating costs over the operating costs of the same properties operated as two or three separate units. In this connection it can safely be said that the operating costs and the minimum rents and royalties of Consolidated today are as low as it is possible to get them; are consistent with today's economic conditions; are on an advantageous basis with competitors, and will enable the company to operate on a profitable basis with a return of anything like normal business volume.

- A 50% reduction in minimum rents and royalties in two of the major leases of Consumers was conditioned upon the reorganization of Consolidated as a unit.
- (2) Working capital will have to be obtained by borrowing and will be secured by a lien prior to yours. In the Committee's, plan it is stated that working capital may be obtained from Consolidated as a result of an alleged operating agreement. We state flatly that the required working capital cannot be so obtained. Consolidated will vigorously oppose any segregation of properties and any payment to Consumers, and if a contest were started on this alleged obligation there would be little, if any, cash or assets in Consolidated when the litigation terminated.
- (3) Segregation is practically impossible. Parts of Consumers', Union's and Consolidated's properties have been combined and the whole organization has been operated as one unit. For example, many of the trucks con-

sist of parts which belong to each of the companies. The same thing is true of all of the plants. Before the properties could be segregated expensive experts and accountants would have to be employed, extensive litigation would take place not only between Consumers and Consolidated, but also between Consumers and Union. While this proceeding goes on, the business of the companies would be jeopardized, its plants would not be properly and adequately maintained, and the interests of all parties would be directed against each other instead of their being back-to-back in an effort to realize a profitable reorganization for all interests concerned.

- (4) The only way that you can obtain income on whatever securities are issued to you is from profits of operation. In this highly competitive business and in these difficult times, it is inconceivable that Consumers with a separate overhead and in competition with Union and Consolidated could make the profits which it could make as a part of one organization. With the reductions in rents and royalties and operating charges which have already been obtained; with still further reductions which will result from reorganization, and with the continued increase in volume of business, it seems indisputable that you as bondhoders will be better off keeping the company together as a unit than you will be if it is segregated into separate organizations.
- (5) Of the three members of the committee which makes this recommendation and signs the plan of reorganization, two are former officers and owners of the

stock of Consumers which was sold to Consolidated for \$3,600,000.00. It is possible that their recommendations may be more to the interests of the former owners of Consumers than to your interests as bondholders. In this connection it is interesting to note that under the committer's recommendation, half of the common stock may be used for a management contract, while the other half is under the control of voting trustees, who are the same members of this committee. Further in this connection, it is certain that the former owners of Consumers will be the new management and controlling elements in the new Consumers. It is quite possible that under a management contract this same group will have half the new stock and will use a part of the \$3,600,000.00 obtained from Consolidated stockholders to furnish the working capital for the new proposed corporation, which in turn will be secured by a lien ahead of your bonds. It is also possible—and we advise you to inquire into it—that this same group has a substantial holding of Consumers' bonds which it has acquired at perhaps a fraction of what your bonds cost you.

We will not burden you with a detailed outline of the Consolidated plan or its benefits to you. The directors in formulating this plan endeavored to work out one which was fair to you, to the Union bondholders and to Consolidated stockholders. It can be called a stockholders' plan. The stockholders did put millions of dollars into the company; their money was used to support your bonds and pay interest thereon; they do have very valuable assets

which are unencumbered and these factors <u>must</u> be recognized.

The Union bondholders' committee has been open-minded and fair in its position concerning re-organization. It has not taken an arbitrary attitude—as has the Consumers committee—that no unified plan could be agreeable. It has been willing to let independent experts determine any differences in value between Union and Consumers bonds.

We feel that the Consolidated plan is fair and equitable to all parties. It keeps the companies together as one unit and gives the present bondholders a preferred position There may be changes in it which in all of the assets. should be made, but there are certain fundamental factors which must be recognized. They are: (1) the companies must be kept as one unit; (2) the present bondholders are entitled to a preference; (3) the new financial structure must be one which is economically sound; (4) the present stockholders have to be given a chance to recover at least part of their investment; (5) neither your interests nor those of the present stockholders should be jeopardized to benefit the individual interests of anyone; and (6) the company must be reorganized as soon as possible so that the attention of the officers and directors can be directed toward earnings.

In closing we respectfully urge that you do not give any approval or consent to the committee's plan of segregation. It is our belief that the members of this commit-

tee have been guided in their conclusions by the recommendations of the former owners of Consumers. have their recommendations and now you have ours. believe their recommendations are prejudiced by personal motives. You may feel that ours are colored by a stockholders view point. We would like to ask that in your own interests you present the Consolidated plan, the Consumers' committee plan and this letter to any unbiased individual familiar with this business. We feel satisfied that he will tell you that the companies should be reorganized as a unit; that reorganization should be completed as quickly and inexpensively as possible; that if you can get the expenses of reorganization and working capital furnished without assessing you or subrogating your position, you should do so and that you should not become embroiled in expensive and drawn out litigation which inevitably would follow if you approve the plan of this committee. It would be to your interest to advise that committee of your complete disapproval of such a plan.

Very respectfully yours,

Robt. Mitchell, Secretary

By Order of the Board of Directors.

P. S.: Please feel free to call upon any officer of the company for any information you desire.

- 12. It was stipulated before the Special Master that the copies of the Operating Agreements of July 15, 1929, and February 16, 1933, attached to the written objections of E. Blois duBois on file (and to the Special Master's Report) are true copies of the original agreements between the corporations named therein, and the same were received in evidence. (See pages 160 and 176, supra.)
- Subsequent to the filing of the Report of the Special Master, and prior to the entry on September 8, 1938, of the Order of Confirmation herein, motion was made by the objector, E. Blois duBois, to reopen the hearing to permit the court to consider the improved condition of the Debtor and its subsidiaries. Said motion was heard by the court on August 1, 1938, approximately nine months after hearing before the Special Master. At that time counsel for said duBois offered in evidence in support of the motion to reopen: (1) the petition of Consolidated filed with the court under date of July 21, 1938, praying authority to discharge a certain mortgage indebtedness of \$18,000, said petition reciting among other things that the corporation had on hand cash in excess of \$250,000, that it was in such condition as to enable it to take advantage of all trade discounts, that it was paying all current creditors, and that it had no obligations other than current bills not due, bonds excepted; and (2) the statement of assets and liabilities and revenues and expenses for the period ended July 1, 1938, filed with the court by Consolidated, a complete copy of which is attached hereto, marked Exhibit B and made a part hereof.

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

-000-

In the Matter

of

OF

ONSOLIDATED ROCK

PRODUCTS CO. a Delaware Corporation

Debtor

No. 25816-H

STATEMENT OF ASSETS AND LIABILITIES AND REVENUES AND EXPENSES FOR THE PERIOD ENDED JUNE 30, 1938.

Pursuant to the order of the Court in the above entitled matter dated July 2nd, 1935, and particularly subdivision 7 thereof, there is attached hereto as Exhibit A and made a part hereof, a statement of the assets and liabilities of the debtor as at June 30, 1938, together with a summary statement of the revenues and expenses of the debtor for the month of June, 1938, and for the six months ended June 30, 1938.

Respectfully submitted,

CONSOLIDATED ROCK PRODUCTS CO.

Ву

Robt. Mitchell

Vice-President

Dated July 20, 1938

CONSOLIDATED BAL

As at June 30

ASSETS

Current:

Cash in banks and on hand

Accounts and notes receivable, trade (\$506,319.81), rents, claims, and other (\$9,937.00), net after provision for bad debt losses and discounts (\$105,008.49)

Inventories of rock, sand, gravel (at basic cost rates established in 1932) and building materials at lower of cost or market

Prepaid items, including insurance and taxes (\$27,580.28), and operating supplies (\$78,084.55)

Total Current Assets

\$ 311,916.50

411,248.32

\$ 99,307.16

Properties, consisting of lands, deposits, plants, structures, and machinery and equipment (including automotive equipment) at values authorized by the Board of Directors of the parent company and made effective October 1, 1931, plus subsequent additions at cost, less provisions for depreciation and depletion

Rock and gravel deposits held on lease, at nominal reappraised values of October 1, 1931

Other Assets:

. Held by trustees under bond indentures, cash (\$21,770.70) and notes from controlled company (\$5,600.00) 27,370.70 Deferred charges applicable to future periods 6,498.62 Insurance and other deposits 12,904.98 Bonds held by subsidiary company, at cost. Sundry stocks and bonds at approximately 25% of cost, value unknown 4,625.00 9,411.93 Unamortized bond discount and expense 117,944.39 Reorganization expense 22,149.33 200,904.95

Total Assets

\$3,723,738.15

4			
PRODUCTS CO.			
elaware) . •		* 1	
diary companies NCE SHEET		•	
NCE SHEET			
1938 <u>LIABILITIES</u>			
Current accounts payable (\$193,267.98),			
accrued items (78,733.25),			
& miscellaneous (7,905.57),			,
other than bond interest.		\$ 279,906.80	
Purchase money obligations (on a bunker site gravel deposit motor trucks, tires and	3		
insurance):	, , ,		
Past due, payments extended by agreement	\$ 9,000.00		
. Payable during 1938	38,036.70	*	
Payable subsequent to 1938 .	20,338.41		
A'-i	-		
Accrued interest on bonds (see accompanying	₹ .		
Balance Sheet for details of defaults): Union Rock Company, from September 1, 1933	0547 026 60		
Consumers Rock & Gravel Company, Inc.	\$547,036.68		
from June 25, 1934	306,990,00	854,026.68	,
	000,330.00	0.07,020.08	
Public improvements assessment bonds		326.92	
Rentals received in advance		603.66	
General provision for sundry unascertained lia-	•		
bilities		36,985.24	
Funded debt (see accompanying balance sheets for details of defaults):	5		
Union Rock Company, first mortgage 6%			D
serial and sinking fund (gold) bonds			
authorized \$5,000,000,00, issued, \$2,500.			
000.00, retired \$520,500.00, purchased and			
held in the treasury \$102,500,00:			
Outstanding: Matured September 1, 1933 to	, •		
September 1, 1937	\$ 273,000.00		
Maturing September 1, 1938			
Maturing 1937 to 1947	1,550,000.00		
	\$1,877,000.00	*	
Consumers Rock & Gravel Company, Inc.			
first mortgage sinking fund (gold)			
first mortgage sinking fund (gold) bonds, authorized \$2,500,000.00, issued	No.		
\$1,500,000.00, retires. \$299,500.00, pur-		*	
chased and held in treasury \$63,500.00:	4.449.000		
Outstanding, maturing July 1, 1948	1,137,000.00	3,014,000.00	
• • • • • • • • • • • • • • • • • • • •	1	24 252 224 44	
,	-/-	\$4,253,224.41	
CAPITAL AND SURP	LUS	, ,	
apital Stock:	1	1 100	
Preferred stock, cumulative, participating,		77. 17	
\$1.75 dividend, no par, liquidating value			
\$25.00 per share, 300,000 shares authorized, 285,947 shares outstanding			
NOTE: Cumulative dividends unpaid	\$1,800,000.00		
since May 30, 1930 \$4,044,958.58			
Common Stock, no par, 700,000 shares au-			
thorized 397,455 shares outstanding	1.00		
Departing deficiency in the second	\$1,800,001.00		
Derating deficit (*) from October 1, 1931, less		- L	
\$18,912.38 paid-in surplus	2,329,487.26*	529,486.26*	
Total Liabilities, Capital and Surplus		e2 725 770 sr	1
com manning, Capital and Surphis	4	\$3,725,738.15	
*) Deficit.			

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CONSOLIDATED ROCK PRODUCTS CO. (Incorporated in Delaware) And its wholly owned subsidiaries

CONSOLIDATED INCOME ACCOUNT

For the five months ended June 30, 1938

	JUNE	YEAR TO DATE
Sales, net of discounts and allowances	\$379,010.98	\$1,711,402.71
Cost of sales, plus selling and administrative expense, but without depreciation and deple-		
tion deducted below	328,871.34	1,526,974.87
Operating profit before deducting depre-		9
	\$ 50,139.64	\$ 184,427.84
Other income, net	4,124.58	11,232.93
Net income before bond interest, depreciation, depletion and amortization, deducted below. Deduct interest expense on bonds of subsidiaries	\$ 54,264.22	\$ 195,660.77 90,700.02
and the second s	,	.0 .
Net profit before depreciation, depletion and amortization	\$ 39,147.55	\$ 104,960.75
Provision for depreciation and depletion of prop- erty, computed on reappraised values made effective October 1, 1931, and on cost of	*	
additions subsequent thereto	12,639.69	72,553.37
	\$ 26,507.86	\$ 32,407.38
Amortization of bond discount and expense	1,192.00	7,152.00
NET PROFIT	25,315.86	\$ 25,255.38

CONSOLIDATED ROCK PRODUCTS CO.
(Incorpo ated in Delaware)
BALANCE SHEET

ASSETS			NCE SH	IEET LIABILITIES	•	
Current:			1	Accounts payable, trade	1	\$ 193,267.98
Cash in banks and on hand Receivables, net of reserves:		\$ 303,056.55		Accrued liabilities: Salaries and wages	\$34,562.92	
Trade accounts	\$ 385,193.43			Taxes:	40 1,002.52	
Sundry accounts Sundry notes	8,986.82 17,068.07	411,248,32	•	Sales (State) \$15,789.79 Social Security 15,098.13		
Inventories of rock, sand, and gravel (at basic cost rates established in 1932) and build			Transport of the last of the l	Other 788.85 Other accrued items; including compensation in surance		
ing materials at lower of cost or market Inventories of operating and automotive supplie		99,307.16		(\$7,397.52) 7,687.14	39,363.91	73,926.83
at cost	•	78,084.55 27,580.28		Other accounts payable Public improvement assessment bonds (pay-		7,905.57
Prepaid insurance, taxes and license fees		\$ 919,276.86		able in 1938) Installment contracts for trucks, truck tires		302.60
Investments in subsidiary companies: Principal amount of bonds:	-	φ 919,270.00		and insurance		35,375.11
Consumers Rock & Gravel Company, Inc. Union Rock Company	\$ 63,500.00 102,500.00	•		General provisions for sundry unascertained		\$ 310,778.09
Capital stock \$4,627,134.36 Deduct: diminution applicable	102,500.00	0	,	liabilities	* '- '-	36,985.24
to property values shown by books of subsidiaries		,		Revenues received in advance		603.66
(as indicated through				Current accounts with subsidiaries (not includ-		
values authorized by Board of Directors of Consoli-	* /			ing credits for depreciation, depletion,		
dated 'Rock Products Co.,				and amortization, see below), due upon termination of operating agreement		842,710.18
October 1, 1931) less sub- sequent depreciation applic-		* * *			:	
able thereto 934,517.00	3,692,617.36			Accumulated depreciation, depletion and amor-		
Current accounts (not including			-	tization on subsidiary companies' prop-		
credits for depreciation, depletion, and amortization				erties from April 1, 1929, to June 30, 1938, computed on values shown by		T 04T 200 01
of subsidiaries' properties,				books of subsidiaries		5,065,399.81
see contra) due upon tér- mination of operating			•			\$6,256,476.98
agreement	586,111.62	4,444,728.98				
Interest receivable accrued on bonds		40				. /
of subsidiaries held in treasury		46,918.32	-	CAPITAL AND SURPL	US	
Properties, consisting of lands, deposits, plants, structures,				Capital Stock:		
and machinery and equip-						
ment (including automotive			1.4	Preferred stock, cumulative, participating, \$1.75 dividend, no par, liquidating value		
equipment \$242,634.27) at values authorized October		* * *		\$25.00 per shares, 300,000 shares	*1 900 000 00	1
1, 1931, by the Board of				authorized, 285,947 shares outstanding	\$1,800,000.00	,
Directors, plus subsequent additions at cost, less pro-	•			NOTE: Cumulative dividends unpaid since May 30, 1930 (\$4,044,958.58)	4	
vision for depreciation \$254,476.80)		271,503.82		since May 30, 1900 (\$4,044,938.38)	-	
Deposits held on lease, at nominal		2/1,303.02				
reappraisal value of Oc- tober 1, 1931		1.00		Common stock, no par, 700,000 shares authorized, 397,455 shares cutstanding	1.00	
Other Assets:	(412.004.00		•			
Insurance and other deposits Deferred charges applicable to subsequent	\$12,904.98				\$1,800,001.00	4
periods Sundry stocks and bonds at approximately	5,095.50			Operating deficit (*) from October 1, 1931 to		
25% of cost, value unknown	4,411.93	******		June 30, 1938, less \$18,912.38 paid-in		
Reorganization expense	22,149.33	44,561.74	, .	surplus	2,329,487.26*	529,486.26*
	. 8	\$5,726,990.72				\$ 5,726,990.72
Value of investments as stated is equal to the	not worth a	non' books of		(e) D-f-ie		
subsidiary companies after the eliminations of	any recorded	goodwill.	-	(*) Deficit.		. /
	,	7	Y .	And the second of the second o	1 1000000000000000000000000000000000000	

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CONSUMERS ROCK & GRAVEL COMPANY, INC., (Incorporated in Delaware)

BALANCE SHEET As at June 30, 1938

ASSETS & DEBIT ITEMS

Property:

Land, rock deposits, and leaseholds	\$1,530,129.15	
Plants, structures, machinery and equipment	2,309,984.72	
Automobiles, trucks and trailers	309,198.18	
**		
	\$4,149,312.05	
Less: provision for depreciation & deple-		•,
tion	2,764,258.83	
Net book value of property Interest in net worth of affiliated companies:		\$1,385,053.22
Saticoy Rock Company (\$33,966.88) Atlas Mixed Mortar Co. (467.39)*	• •	33,499.49
Other Assets:	14	
Bond redemption, cash funds and notes re- ceivable in hands of bond trustee		11,737.00
Prepaid rents		183.46
Unamortized bond discount and expense		42,069.29
Current account with parent company (not in- cluding debits for depreciation and depletion		
of properties, see below)		119,409.50
Accumulated depreciation and depletion of prop		
erties from April 1, 1929 to June 30, 1938 (computed upon book value of property)	•	1,976,358.25
		\$3,568,310.21

LLABILITIES

		0 0		
Rents and royalties accrued		•	. \$	2,444.56
Accrued interest on bonds (see footnote for				2.
details of defaults)				324,135.00
First mortgage sinking fund (gold) bonds, (see footnote for details of defaults):				
Authorized \$2,500,000.00, issued \$1,500,000.00; retired \$299,500.00, outstanding & maturing July 1, 1948 (\$63,500.00 owned)				
by parent company)			- 1,	200,560.00
	:		\$1,	527,079.56

CAPITAL AND SURPLUS

Capital stock:

Common, authorized 150,000 shares, no par,	*
outstanding 120,328 shares \$1,516,891.51	
Earned surplus 20,331.15	*
Surplus by revaluation of properties 504,007.99	2,041,230.65

\$3,568,310.21

Defaults by failure to make sinking fund deposits required under Consumers Bond Indenture:

10000	-
No.	Interest
ron	Interest

Deposit Dates	Net Outstanding	Owned by Parent Company	For Bond Redemption	Total Defaults
6-25-34	\$ 34,110.00	\$ 1,905.00	\$ 8,985.00	\$ 45,000.00
12-26-34	34,110.00	1,905.00	51,485.00	87,500.00
6-25-35	34,110.00	1,905.00	8,985.00	45,000.00
12-26-35	34,110.00	1,905.00	51,485.00	87,500.00
6-25-36	34,110.00	. 1,905.00	8,985.00	45,000.00
12-26-36	34,110.00	1,905.00	51,485.00	87,500.00
. 6-25-37,	34,110.00	1,905.00	. 8,985.00	45,000.00
12-26-37	34,110.00	1,905.00	51,485.00	87,500.00
6-25-38	34,110.00,	1,905.00	8,985.00	45,000.00
	\$306,990.00	\$17,145.00	\$250,865.00	\$575,000.00

NOTE: Consumers Rock & Gravel Company, Inc., is a wholly owned subsiliary of Consolidated Rock Products Co.

(*) Deficit.

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UNION ROCK COMPANY (Incorporated in Delaware) And its wholly owned subsidiaries

Consolidated Balance Sheets as at June 30, 1938

					1						
				•		2	Union	Reliance	1.00	Orange County	
	ASSETS AND DEBIT ITEMS		Consolidated	Eliminations in Consolidating	Union Rock Company		Rock Land Company	Rock Company	Builders C.R.P.Co.	Rock Corp'n	
ò	Property: Land, rock deposits, and leaseholds Plants, structures, machinery and equipment Automobiles, trucks and trailers	,	\$2,207,459.55 3,377,980.81 296,219.88		\$1,645,044.60 2,385,698.49 440,780.92		377,454.39 28,713.67 139,037.98	\$159,960.56 767,913.96 1,638.20	\$ 25,000.00 195,654.69 14,762.78	•	
	Less: provision for depreciation, depletion and amortization		\$5,881,660.24 4,208,525.95		84,171,524.01 3,025,610.57	\$	545,206.04 186,447.64	\$929,512.72 767,581.59	\$235,417.47 228,886.15		
	Net book value of property		\$1,673,134.29	F	\$1,145,913.44	-	358,758.40	\$161,931.13	\$ 6,531.32		-
*	Investment in stock of subsidiary companies			\$1,049,834.69	\$ 907,554.31	. =	142,280.38				
	Investment in stock of Sunset Rock Products Company (40%, at cost)		\$ 149,956.80	***************************************	9	-	149,956.80		7		
	Other Assets: Cash in Bank Bond redemption and special funds in hands of trustees Sundry stocks and bonds, at cost, value unknown		8,859.95 15,633.70	*	\$ 15,633.70		8,356.20		1	\$502.75	
	Prepaid rents and fonds, at cost, value unknown Prepaid rents and royalties Unamortized bond discount and expense		9,625.00 1,219.66 75,875.10		349.14 75,875.10		9,625.00	808.02		62.50	
			\$ 261,170.21		\$ 91,857.94	\$	\$167,938.00	\$ 808.02		\$566.25	
	Current account with parent company (not including delets for depreciation, depletion, and ambritization of properties (see below,) due upon			6	•			· ••		1	
	termination of operating agreement	1	\$ 719,664.49		\$ 719,522.31				\$ 142.18	*/	
	Accumulated depreciation, depletion, and amortization of properties from April 1, 1929, to June 30, 1938 (computed upon cost of properties)	•	2,870,451.40		2,092,881.10	\$	158,519.47	\$482,610.62	136,440.21	Y .	
,	Total Assets and Debit Items		\$5,524,420.39	\$1,049,834.69	\$4,957,729.10	\$5	827,496.25	\$645,349.77	\$143,113.71	\$566.25	
								4			-
	LIABILITIES		1 77 10		021 10						
ı	Rents and royalties accrued Interest payable accrued Purchase money obligations (on bunker site and gravel deposit):		\$ 1,721,18 215.68		\$° 871.19 116.68	\$	99.00		\$ 833.33	\$ 16.66	
ı	Past due, payments extended by agreement Payable during 1938	9,000.00 5,500.00		44.	1/		*		/. ·		
	Payable after 1938	17,500.00	32,000.00		14,000.00		18,000.00				
I.	Accrued interest on bonds (see footnote for detail of defaults) Funded debt (see footnote for defaults):		576,810.00		576,810.00						
ı	First mortgage, 6%, serial and sinking fund (gold) bonds, authorized \$5,000,000.00, issued \$2,500,000.00, retires, \$520,500.00; Outstanding (of which \$102,500.00 is owned by parent company):						Y				
ı	Matured September 1, 1933 to September 1, 1937	281,000.00						ž.			
	Maturing September 1, 1938 Maturing 1939 to 1947	54,000.00 644,500.00	1,979,500.00		1,979,500.00		46				
	Current account with parent company (not including debits for depreciation, depletion and amortization of properties, see contra), due upon		-			:					
ı	termination of operating agreement.		547,742.30		1	4	450,714.95	\$ 96,781.51	•	\$ 45.84	
	Total Liabilities		\$3,137,989.16		\$2,571,297.87	\$4	468,813.95	\$ 96,981.51	\$ 833.33	\$ 62.50	
	CADITAL AND SUPPLIES										
	CAPITAL AND SURPLUS Capital Stock:		/ .		- · · A					* * * :	
	Class A stock, no par, \$1.75 dividend, 160,000 shares authorized and outstanding		\$ 705,656.92		\$ 705,656.02				,		
	Class B stock, no par, \$1.00 dividend, 400,000 shares authorized and outstanding		1,705,124.53		1,705,124.53	•		/			
	Common stock, par \$100.00 per share Surplus:	, 4.		\$1,062,400.00		83	364,700,00	\$500,000.00	\$197,200.00	\$500.00	
	Earned surplus or deficit* Paid-in surplus	· .	24,350.22*	19,910.00	24,350.22*		6,017.70*	48,368.26	74,829.62* 19,910.00	3.75	
	Total Capital and Surplus	*	\$2,385,431.23	\$1,049,834.69	\$2,386,431.23	\$	358,682.30	\$548,368.26	\$142,280.38	\$503.75	
	Total Liabilities, Capital and Surplus		\$5,524,420.39	\$1,049,834.69	\$4,957,729.10	\$6	827,496.25	\$645,349.77	\$143,113.71	\$566.25	
							4				

Defaults by failure to make sinking fund deposits required under Union Bondo indenture:

	For Seria	Maturities	Fo	or Interest		
Deposit. Dates	Net Outstanding	Owned by Parent Company	On net Outstanding	On bonds owne by parent Company	For Bond Redemption	Total Defaults
8-25-33 2-25-34	\$ 56,000.00	\$1,000.00	a 56 310 00	2 675 00	\$ 21,515.00	\$ 78,515.00#
8-25-34	59,000.00		\$ 56,310.00 56,310.00	3,075.00	20,615.00	80,900.00 140,000.06
2-25-35 8-25-35	50,000.00	V	56,310.00 56,310.00	3,075.00	20,615.00	80,000.00

Payable ofter 1938	At politicals:	MANAGER		The state of the s		· ·	recessor and Adecide	tidad layour days
Accrued interest on bonds (see footnote for detail of defaults) Funded debt (see footnote for defaults):		576,810.00		576,810.00				
First mortgage, 6%, serial and sinking fund (gold) bonds, authorized \$5,000,000.00, issued \$2,500,000.00, retires \$520,500.00; Outstanding (of which \$102,500.00 is owned by parent company):								
Matured September 1, 1933 to September 1, 1937 \$ 2 Maturing September 1, 1938	281,000.00 54,000.00 544,500.00	1,979,500.00		1,979,500.00	2	4	•	
Current account with parent company (not including debits for depreciation, depletion and amortization of properties, see contra), due upon termination of operating agreement		547,742.30			450,714.95	\$ 96,981.51		\$ 45.84
Total Liabilities	/ .	\$3,137,989.16	1.	\$2,571,297.87	\$468,813.95	\$ 96,982.51	\$ 833.33	\$ 62.50
	~				1,00		4	-
CAPITAL AND SURPLUS Capital Stock:						/	•	
Class A stock, no par, \$1.75 dividend, \$20,000 shares authorized and outstanding		\$ 705,656.92		\$ 705,656.02	:11			
Class B stock, no par, \$1.00 dividend, 400,000 shares authorized and outstanding		1,705,124.53	•	1,705,124.53				
Common stock, par \$100.00 per share Surplus: Earned surplus or deficit* Paid-in surplus		24,350.22*	\$1,062,400.00 32,475.31* 19,910.00	24,350.22*	\$364,700.00 6,017.70*	\$500,000.00 48,368.26	\$197,200.00 74,829.62* 19,910.00	\$500.00 , 3.75
Total Capital and Surplus		\$2,386,431.23	\$1,049,834.69	\$2,386,431.23	\$358,682.30	\$548,368.26	\$142,280.38	\$503:75
				/				

Defaults by failure to make sinking fund deposits required under Union Bond indenture:

Total Liabilities, Capital and Surplus

	For Seria	Maturities	For	Interest	_	
Deposit Dates	Net Outstanding	Owned by Parent Company	On net Outstanding	on bonds owned by parent Company	For Bond Redemption	Tota! Defaults
8-25-33	\$ 56,000.00	\$1,000.00	0		\$ 21,515.00	\$ 78,515.00#
2-25-34			\$ 56,310.00	3,075.00	20,615.00	*80,000.00
8-25-34	59,000.00		56,310.00	3.075.00	21,615.00	140,000.00
2-25-35		0 1 .	56,310.00	3,075.00	20,615.00	80,000.00
8-25-35	50,000.00		56,310.00	3,075.00	30,615.00	140,000.00
2-25-36			56,310.00	3,075.00	20,615.00	80,000,00
8-25-36	58,600.00	2,000.00	56,310.00	3,075.00	20,615.00	140,000.00
2-25-37-	/	١.	56,310.00	3,075.00	20,615.00	80,000.00
8-25-37	52,000.00	5.000.00	56,310.00	3,075.00	23,615.00	140,000.00
2-25-38			56,310.00	3,075.00	20,615.00	80,000.00
	\$275,000.00	\$8000.90	\$506,790.00	\$27,675.00	\$221,050.00	\$1,038,515.00

NOTE: (1). Capital Stock of Orange County Rock Corporation is pledged under trust indenture securing bonds of Union Rock Company.

(2). The Union Rock Company is a wholly owned subsidiary of Consolidated Rock Products Company.

(#). The interest requirement (\$61,485.00) of the \$140,000.00 deposit requirement for August 25, 1933, was not defaulted.

(*). Deficit.

- 14. The following documents were filed in the United States District Court in the above entitled proceeding on the dates hereinafter set forth, and may be deemed incorporated in this Agreed Statement of the Case. Said documents, made a part hereof by reference, may be prepared by the clerk of said court and forwarded to the Circuit Court of Appeals with and as a part of this Agreed Statement of the Case:
 - (a) Petition of Debtor, Union Committee and Consumers Committee, filed April 23, 1937, submitting plan of reorganization dated March 15, 1937, including the following exhibits thereto: said plan of reorganization (Exhibit A thereto), the letter from Union Committee to depositors of Union bonds (Exhibit B), summary of said plan of reorganization (Exhibit C), the letter from Consumers Committee to depositors of Consumers bonds (Exhibit G), and the letter from Consolidated to its stockholders (Exhibit L):
 - (b) Petition filed October 1, 1937, for hearing upon proposal, consideration and confirmation of said plan of reorganization dated March 15, 1937;
 - (c) Objections filed August 25, 1937, by E. Blois duBois to said plan of reorganization, omitting Operating Agreements dated July 15, 1929, and February 16, 1933, attached thereto;
 - (d) Supplemental objections filed October 21, 1937, by said duBois to said plan of reorganization;
 - (e) Findings and Report of Frank P. Doherty, Special Master, filed February 14, 1938, including exhibits attached thereto;

- (f) Exceptions of said duBois, filed March 4, 1938, to said report of Special Master;
- (g) Supplemental exceptions of said duBois, filed March 5, 1938,0to said report of Special Master;
- (h) Motion of said duBois, filed July 22, 1938, for reopening of hearing on said plan of reorganization:
- (i) Affidavit filed July 22, 1938, in support of said motion of duBois to reopen said hearing on said plan;
- (j) Motion filed by Preferred Stocholders' Committee on August 5, 1938, to dismiss motion to reopen hearing on confirmation of said plan;
- (k) Minute order of August 5, 1938, denying said motion to reopen said hearing on said plan;
- (1) Memorandum of decision by Judge Harry A. Hollzer filed August 8, 1938;
- (m) Findings and order of court, entered September8, 1938, confirming said plan of reorganization;
- (n) Petition for leave to appeal, filed with United States District Court on October 4, 1938;
- (o) Order of United States District Court allowing appeal, entered October 4, 1938;
- (p) Citation issued by United States District Court on October 4, 1938, on appeal, and acknowledgment of service of same;

- (q) Cost bond on appeal;
- (r) Petition for leave to appeal filed with Clerk of Circuit Court of Appeals on October 8, 1938;
- Court of Appeals on October 8, 1938;
 - (t) Citation on Appeal issued on October 10, 1938, by Circuit Court of Appeals and acknowledgment of service thereof;
- (u) Order of Circuit Court of Appeals allowing appeal, entered October 10, 1938;
- (v) Notice of appeal filed October 8, 1938;
- (w) Any and all orders hereafter made enlarging time in which to file Transcript of Record on appeal.
- 15. The appellant, E. Blois duBois, has appealed from the order entered September 8, 1938, confirming the Plan of Reorganization, and relies upon each of the points enumerated in his Assignment of Errors, filed with the Circuit Court of Appeals, which is hereby made a part hereof.
 - 16. It is stipulated that the foregoing statement of evidence and proceedings, with those portions of the record specified in Paragraph 14 for inclusion as a part hereof, fully and fairly set forth all evidence taken and proceedings had which are essential to decision of the questions raised by the appeals herein.

Dated: December 16, 1938.

JOHN G. MOTT PAUL VALLEE

KENNETH E. GRANT

By Kenneth E. Grant
Attorneys for Appellant.

O'MELVENY, TULLER & MYERS HOMER I. MITCHELL And Graham L. Sterling, Jy.

Attorneys for Appellees F. S. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee.

GIBSON, DUNN & CRUTCHER

By T. H. Joyce

Attorneys for Appellees Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee.

Stanley Arndt Stanley Arndt

Attorney for Appellees Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co.

LATHAM, WATKINS & BOUCHARD
And Paul Watkins

Attorneys for Appellees Consolidated Rock Products Co.,
Union Rock Company and Consumers Rock & Gravel
Company, Inc.

CERTIFICATE OF COURT ON AGREED STATEMENT OF CASE

The undersigned, Harry A. Hollzer, Judge of the United States District Court for the Southern District of California, Central Division, hereby certifies that the foregoing statement of evidence and proceedings, together with those portions of the record specified in Paragraph 14 for inclusion as a part thereof, fully and fairly present all evidence taken and proceedings had before the Special Master and the Court which are essential to decision of the questions on appeal raised by the Assignment of Errors filed by appellant, E. Blois duBois, with the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which is made a part of said statement.

Dated: December 17, 1938.

H. A. Hollzer Judge.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 44 min. past 9 oclock. Dec 19, 1938 A. M. By M. J. Sommer, Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

In the matter of) In Proceedings
CONSOL DATED ROCK PROD-	for the
UCTS CO., a Delaware corporation,) Reorganization
) of a Corporation.
Debtor,)
	No. 9000
UNION ROCK COMPANY, a cor-) :
poration,	PETITION
) FOR LEAVE
Subsidiary,) TO APPEAL
) TO THE
and _) UNITED
) STATES CIR-
CONSUMERS ROCK & GRAVEL	CUIT COURT
COMPANY/INC., a corporation,	OF APPEALS
Subsidiary	FOR THE
	NINTH .
District Court No. 25816-H.	CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

E. Blois duBois, an objector of record to confirmation of the Plan of Reorganization of the above named debtor corporations submitted by Consolidated Rock Products Co., a corporation, Union Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Company Bondholders' Protective Committee, dated March 15, 1937, and the owner and holder of bonds of Union Rock Company in the principal amount of \$150,000.00 and of Consumers Rock & Gravel Company, Inc., in the principal amount of \$31,500.00, feeling himself aggrieved by the order and decree of the District Court of the United

States for the Southern District of California, Central Division, entered herein on the 8th day of September, 1938, by the Honorable Harry A. Hollzer, one of the judges of said court, denying the exceptions of said E. Blois duBois to the report of the Special Master herein, approving said report and confirming the aforesaid Plan of Reorganization of the above named debtor corporations, hereby petitions for leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from such order and decree, and the whole thereof, for the reasons set forth in petitioner's assignment of errors and brief filed herewith, reference to which is here made.

Petitioner prays that appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be allowed him, that the amount of cost bond on appeal be fixed, that a citation be issued directed to Consolidated, Rock Products Co., a corporation; F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc., Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co., commanding them, and each of them, to appear before the said United States Circuit Court of Appeals for the Ninth Circuit to do and receive that which may appertain to justice in the premises, and that a transcript of the records, papers, proceedings, offers, stipulations and evidence upon which said order and decree was entered, duly authenticated, may be sent to the said, United States Circuit Court of Appeals for the Ninth Circuit.

Under separate cover petitioner for leave to appeal files herewith for consideration by the Court true copies of the following papers constituting a part of the record in these proceedings in the Trial Court:

proceedings in the Trial Court:	, 9
Exhibit A. Findings and Order confirming I of Reorganization	Plan
Exhibit BFindings and Report of Special A	las-
Exhibit CExceptions of Appellant to Find	ings
and Report of Special Master	
Exhibit DSupplemental Exceptions of Appel	lant
to Findings and Report of Spe	ecial
Master	
Exhibit EAppellant's Motion to Re-open H	ear-
ing	1 3
Exhibit FNotice of Motion to Re-open Hear with supporting Affidavit attached	-
Exhibit GTrial Court's Memorandum of C	
clusions	
Exhibit HAppellant's Objections to the Plat	n of
Reorganization	
Exhibit IAppellant's Supplemental Objection	s to
Plan of Reorganization	
Exhibit JPlan of Reorganization	
Dated October 6, 1938.	

E. ELOIS duBOIS
By his attorneys:
JOHN G. MOTT
(John G. Mott)
PAUL VALLEE
(Paul Valee)
KENNETH E. GRANT
(Kenneth E. Grant)

(Clerk's Note: The foregoing exhibits A-J, inc., are not attached hereto for the reason that they already appear in this printed transcript in their chronological order)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA

SS

COUNTY OF LOS ANGELES)

KENNETH E. GRANT, being first duly sworn, on oath deposes and says:

That he is one of the attorneys of record for E. Blois duBois, appellant in the foregoing Petition for Leave to Appeal; that he has read said Petition and knows the contents thereof and that the same is true of his own knowledge; that said E. Blois duBois is a non-resident and absent from the County of Los Angeles, State of California, where affiant and other counsel for him maintain their offices, and for said reason affiant makes this verification for and on his behalf.

Kenneth E. Grant (Sgd.)

Subscribed and sworn to before me this 7th day of October, 1938.

(Seal). Katherine Spengler
Notary Public in and for the County of Los Angeles,
State of California.

(Endorsed) Petition for appeal. Filed Oct. 8, 1938. Paul P. O'Brien, Clerk.

[TITLE OF CIRCUIT COURT OF APPEALS, AND CAUSE.]

ASSIGNMENT OF ERRORS.

Comes now E. BLOIS duBOIS, an objector of record to confirmation of the Plan of Reorganization of the above named debtor corporations submitted by Consolidated Rock Products Co., a corporation, Union Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Co. Bondholders' Protective Committee, dated March 15, 1937, and the owner and holder of bonds of Union Rock Company in the principal amount of \$150,000.00 and of Consumers Rock & Gravel Company, Inc., in the principal amount of \$31,500.00, and in support of his petition filed herewith praying leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain Order and Decree, and the whole thereof, entered herein September 8, 1938, confirming the said Plan of Reorganization submitted by the above named proponents, assigns error of the Court in the entry of said Decree of Confirmation, and in the proceedings herein, as follows:

I.

The Court erred in confirming the proposed Plan of Reorganization in that said Decree is contrary to law in depriving the dissenting bondholders of Union Rock Company and Consumers Rock & Gravel Company, Inc. of fifty per cent (50%) of the principal amount of the bonds held by them while permitting the preferred stockholders of Consolidated Rock Products Co., to participate and share in the reorganization without consideration.

The Court erred in confirming the proposed Plan of Reorganization in that said Decree is contrary to law in depriving the dissenting bondholders of Union Rock Company and Consumers Rock & Gravel Company, Inc. of interest at the rate of six per cent (6%) per annum accrued and unpaid on the Union Rock Company bonds from September 1, 1933 and on the Consumers Rock & Gravel Company, Inc. bonds from June 25, 1934, while permitting the preferred stockholders of Consolidated Rock Products Co. to participate and share in the reorganization without consideration.

III.

The Court erred in confirming the proposed Plan of Reorganization in that said Decree is contrary to law in depriving the dissenting bondholders of Union Rock Company and Consumers Rock & Gravel Company, Inc. of their property interests in the real and personal property securing payment of said bonds without due process of law and for the benefit of the stockholders of Consolidated Rock Products Co.

IV.

The finding of the Court that the Plan of Reorganization is fair and equitable is not supported by substantial evidence.

V.

The Court erred in entering the Decree confirming the proposed Plan of Reorganization in that said Decree is inconsistent with the facts expressly found by the Court and by the Special Master to exist.

VI.

The Court erred in entering the Decree of confirmation cancelling all indebtedness of Consolidated Rock Products Co. to Union Rock Company and Consumers Rock & Gravel Company, Inc. and in said respect the Decree is contrary to law and equity.

VII.

The Court erred in failing and refusing to evaluate the interests of the respective parties to the proposed Plan of Reorganization, by independent appraisal, or otherwise, and in this respect the Decree is contrary to law and equity.

VIII.

The Court erred in failing and refusing to determine the validity of the operating agreement entered into between Consolidated Rock Products Co., Union Rock Company, Consumers Rock & Gravel Company, Inc. and Reliance Rock Company under date of February 16, 1933, purporting to modify the original operating agreement entered into by said companies under date of July 15, 1929, copies of which agreements are attached to the Special Master's Report as exhibits, and in this respect the Decree is contrary to law and equity.

IX.

The Court erred in failing and refusing to determine the amount of indebtedness owing by Consolidated Rock Products Co. to Union Rock Company and Consumers Rock & Gravel Company, Inc., and in this respect the Decree is contrary to law and equity. The Court erred in entering the Decree confirming the proposed Plan of Reorganization in that said Decree is not supported by substantial evidence.

XI.

The Court erred in denying appellant's Exception No. ⁶ I to the Findings and Report of the Special Master, reading as follows:

"To that portion of the Findings captioned 'Subsequent Betterments, and Additions to Equipment of Union Company and Consumers Company,' and to each and every part thereof, Master's Report, pages 21 and 22, reading as follows, commencing in line 10, page 21:

'The evidence shows that substantial sums were expended by Consolidated in the repair and maintenance of the properties of the Union Company, Consumers Company, and Reliance Company, and also that the trucks and automobiles and portions of the other equipment of the three above mentioned subsidiaries became unserviceable and worn out in the usual course of the operations in the carrying on of the business by Consolidated, and that equipment was purchased by Consolidated out of the funds and moneys of Consolidated to replace said worn out and unserviceable equipment and to purchase new and additional trucks and equipment and appliances. The evidence further shows that in some instances the trucks and automobiles which were worn out and unserviceable were turned in or delivered as a part payment on account of the new trucks and other equipment acquired by Consolidated; that such new and renewed equipment so purchased by Consolidated was necessary, proper, and essential to

the carrying on of the business of Consolidated and its subsidiaries; that the funds with which said new and additional equipment was purchased and paid for were supplied by Consolidated from the usual operating revenues of the properties of the Union Company, Consumers Company, and Reliance Company, and also from the properties of Consolidated, and also from proceeds received by Consolidated from the sale of its stock to the public. The evidence further shows that there was such commingling of said funds last hereinabove referred to as to make it impracticable, from an accounting or other standpoint, to determine the amount of money from either or all of the respective sources which was used to replace, renew, or purchase additional trucks, automobiles, and other appliances and equipment used by Consolidated in and about the business. It is therefore found that, assuming that the lien of the Trust Indentures of the Union Company and the Consumers Company pursued and attached to such new, renewed, and additional equipment so as to subject said trucks, automobiles, appliances, and other equipment to the lien of said Trust Indenture and as security for the bonds issued thereunder, it is both impracticable and, from an accounting standpoint, impossible to determine to what extent the equipment now owned and operated by Consolidated is a renewal, replacement, or substitution of such automobiles, trucks, appliances, and other equipment of the Union Company, the Consumers Company, and the Reliance Company, or is new equipment purchased by Consolidated for and on its own account from the proceeds resulting from the operation of the properties by Consolidated or from the funds received from the sale of Consolidated stock, and therefore not subject to the lien of said Trust Indentures, Special Master's Exhibits 12 and 13,"

said exception being based

upon the fact that said specific findings are contrary to the evidence adduced before the Special Master showing: That funds used by Consolidated Rock Products Company for making repairs, subsequent betterments and additions to the equipment and properties of Union Rock Company and Consumer's Rock & Gravel Company included funds taken over by Consolidated Rock Products Company from the subsidiaries at the time of the so-called consolidation, or commencement of joint operation, as well as from operation and exploitation thereafter of the properties of the subsidiaries, and that pursuant to the covenants of the original operating agreement of July 15, 1929 full and complete books of account were kept showing the charges for such improvements and betterments against the respective companies, and that no such confusion of assets has resulted that definite determination as to what properties belong to the respective companies, the true valuation thereof, and to what liens such assets may be subject, cannot be determined."

Denial of the above exception was contrary to law and the evidence.

XII.

The Court erred in denying appellant's Exception No. II to the Findings and Report of the Special Master, reading as follows:

"To that portion of the Findings captioned 'Plan is Fair and Has been Approved by Required Percentage of Bondholders and Stockholders,' Master's Report, page 25, finding the Plan of Reorganization to be fair to the bondholders of Union Rock Company and/or Consumers Rock & Gravel Company, Inc., and to the further portion of the Findings under said caption, commencing at the end of line 28, page 27 of the Master's Report, and reading as follows:

'It is found that the Consolidated stockholders have substantial equities in the properties included in the Plan of Reorganization, and that the interests and rights granted said stockholders under the Plan of Reorganization are not out of proportion to the equities for said stockholders, considering their contribution to the existing properties now represented by the Consolidated companies and that the plan of reorganization in fair, just and equitable with respect to the rights of said stockholders',"

said exception being based

"upon the fact that said specific Findings are contrary to the evidence adduced before the Special Master showing: That Consolidated Rock Products Co., as the sole stockholder of Union Rock Company and Consumers Rock & Gravel Company, Inc., has no substantial or other equity in either company, is indebted to said subsidiaries under the operating agreement attached to the Special Master's report in an amount in excess of \$6,000,000,000, which it is unable to pay, and has no property of substantial value to contribute to the Plan of Reorganization so as to justify its retention of equity ownership while bonded indebtedness is being halved, accrued interest waived and future interest reduced."

Denial of the above exception was contrary to law and the evidence

XIII.

The Court erred in denying appellant's Exception No. III to the Findings and Report of the Special Master, reading as follows:

"To all that portion of the Findings captioned 'Findings with Respect to the Objections of Objector E. Blois duBois,' Master's Report, page 28, commencing at line 18, page 29, and reading as follows:

'The main and principal objection of Mr. duBois to the plan of reorganization may be summarized as follows: That the stockholders of Consolidated have no equity in or to the properties represented by the plan of reorganization, and that said stockholders should not be given any right or interest under said plan, and that the entire properties of the Union Company, Reliance Company, Consumers Company and of Consolidated, including all of the equipment, trucks, automobiles and appliances, be available for sole benefit of the bondholders of the Union Company and Consumers Company. The evidence shows that the objection of Mr. duBois is without merit or support. The other objections of Mr. duBois, as presented in his written objections and at the hearing, have been covered by other portions of these Findings and are likewise without merit or support,'

and to the failure of the Master to find specifically upon the several objections to the Plan of Reorganization presented in the written objections of said E. Blois duBois on file herein,"

said exception being based

"upon the fact that said specific findings are contrary to the evidence adduced before the Special Master showing: That the objections of Objector E. Blois duBois to the unfairness of the plan are meritorious and that the plan contemplates a reduction of the lien interest of the bondholders for the benefit of the stockholders of Consolidated Rock Products Company, who at the present have no substantial equity and are called upon to make no sacrifice whatever under the Plan of Reorganization.

Denial of the above exception was contrary to law and the evidence.

XIV.

The Court erred in denying appellant's Exception No. IV to the Findings and Report of the Special Master, reading as follows:

"To that portion of the Findings captioned 'Independem' Appraisal,' Master's Report, page 30, and each part thereof, reading as follows:

'The plan of reorganization, as heretofore found, is the result of nearly two years of conscientious effort of opposing and conflicting interests. The evidence developed that there has been such a commingling of the assets and properties, including the funds from the sale of stock of Consolidated, that an appraisal of the properties would be of no value to the court and would be of such indefinite and unsatisfactory nature as to produce further confusion, and a separate, independent appraisal would result in unnecessary and great delay and expense to all parties. Its benefits would be highly problematical. There is no evidence that the plan of reorganization has dealt unfairly or inequitably with the bondholders of the Union and Consumers companies or the stockholders of Consolidated. All interests are unanimous in their conviction that none of the interests are receiving as much as they are entitled to. The evidence shows, however, that the division of the respective interests in the plan of

reorganization not only presents a feasible and workable plan, but likewise has taken into consideration all of the claims equities and rights of the bondholders and stockholders and has arrived at a plan which gives full recognition to the rights and equities of each class,"

and to the failure of the Master to order disinterested appraisal of the assets of the respective corporations proposed to be transferred to the new corporation in effecting reorganization of the debtor companies, or otherwise to evaluate the interests of the respective parties to the Plan of Reorganization,"

said exception being based

"upon the fact that said specific findings are contrary to the evidence adduced before the Special Master showing: That Consolidated Rock Products Company, as the sole stockholder of Union Rock Company and Consumers Rock & Gravel Company, Inc., has no substantial or other equity in either company, is indebted to said subsidiaries under the operating agreement attached to the Special Master's report in an amount in excess of \$6,000,000.00, which it is unable to pay, and has no property of substantial value to contribute to the Plan of Reorganization so as to justify its retention of equity ownership while bonded indebtedness is being halved, accrued interest waived and future interest reduced,"

and

"that reference to the Special Master was made in part for the purpose of passing upon the matters as to which no findings have been made, and that findings upon said matters are essential to proper determination of the issues before the Court, including the fairness of the Plan of Reorganization and respective rights of the various parties interested therein."

and the state of t

Denial of the above exception was contrary to law and the evidence.

XV.

The Court erred in denying appellant's Exception No. V. to the Findings and Report of the Special Master, reading as follows:

"To the failure of the Special Master to find upon the question of the solvency of Union Rock Company and/or Consumers Rock & Gravel Company, Inc.,"

said exception being based

"upon the fact that reference to the Special Master was made in part for the purpose of passing upon the matters as to which no findings have been made and that findings upon said matters are essential to proper determination of the issues before the Court, including the fairness of the Plan of Reorganization and the respective rights of the various parties interested therein."

Denial of the above exception was contrary to law and the evidence.

XVI.

The Court erred in denying appellant's Exception No. VI to the Findings and Report of the Special Master, reading as follows:

"To the failure of the Special Master to find upon the validity of the agreement purported to have been entered

into by Consolidated Rock Products Company, Union Rock Company, Consumers Rock & Gravel Company, Inc. and Reliance Rock Company under date of February 16, 1933, purporting to modify the original operating agreement entered into by said companies under date of July 15, 1929, copies of which agreements are attached to the Special Master's Report as exhibits,"

said exception being based

"upon the fact that reference to the Special Master was made in part for the purpose of passing upon the matters as to which no findings have been made and that findings upon said matters are essential to proper determination of the issues before the Court, including the fairness of the Plan of Reorganization and the respective rights of the various parties interested therein."

Denial of the above exception was contrary to law and the evidence.

XVII.

The Court erred in denying appellant's Exception No. VII to the Findings and Report of the Special Master, reading as follows:

"To the failure of the Special Master to make any finding with respect to the indebtedness owing by Consolidated Rock Products Company, Union Rock Company, Consumers Rock & Gravel Company, Inc. and/or Reliance Rock Company, one to the other, under the written agreements referred to in Exception VI above,"

said exception being based

"upon the fact that reference to the Special Master was made in part for the purpose of passing upon the matters as to which no findings have been made and that findings upon said matters are essential to proper determination of the issues before the Court, including the fairness of the Plan of Reorganization and the respective rights of the various parties interested therein."

Denial of the above exception was contrary to law and the evidence.

XVIII.

The Court erred in denying appellant's Exception No. VIII to the Findings and Report of the Special Master, reading as follows:

"With reference to the Findings of the Special Master as to the value of the properties involved, Master's Report, pages 22 to 25, both inclusive, exception is taken to the value of \$1,000,000.00 placed upon the assets of Consolidated Rock Products Company and the value of \$500,000.00 placed upon its good will and going business value, on the ground that said Findings, and each of them, are not supported by the evidence and that the Finding as to good will and going business value is not supported by competent testimony, but merely by the guess and speculation of one witness."

Denial of the above exception was contrary to law and the evidence.

XIX.

The Court erred and abused its discretion in entering its order of August 1, 1938 denying the motion of petitioner and appellant for re-opening of hearing on the proposed Plan of Reorganization herein, and objections thereto, to consider the marked improvement in the financial and business conditions of the debtor companies as shown by earnings statements for the period subsequent to completion of hearing before the Special Master on November 17, 1937.

WHEREFORE, petitioner and appellant prays that the Order and Decree confirming the Plan of Reorganization herein be reversed.

Dated: Los Angeles, California, October 7, 1938.

JOHN G. MOTT
(John G. Mott)

PAUL VALLEE
(Paul Vallee)

KENNETH E. GRANT
(Kenneth E. Grant)

Attorneys for Appellant.

(Endorsed) Assignment of Errors. Filed Oct. 8, 1938. Paul P. O'Brien, Clerk.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 12 min. past 2 o'clock Oct. 24, 1938 P. M. By M. J. Sommer, Deputy Clerk.

At a Stated Term, to wit: The October Term A. D. 1938, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the tenth day of October in the year of our Lord one thousand nine hundred and thirty-eight.

PRESENT:

Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding,

Honorable FRANCIS A. GARRECHT, Circuit Judge, Honorable WILLIAM DENMAN, Circuit Judge.

E. BLOIS	DuBOIS,)
		Appellant,)
	ys.) No. 9000
CONSOLI	DATED ROCK	PRODUCTS	5)
CO., a	Corporation, et a	Appellees.)

ORDER ALLOWING APPEAL.

Upon consideration of the petition of E Bloise duBois, for allowance of appeal under section 24b of the Bankruptcy Act, filed October 8, 1938, and of the assignments of error thereon, filed therewith, and by direction of the Court.

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Southern District of California, Central Division, entered herein on the 8th day of September, 1938, be, and the same hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

IT IS FURTHER ORDERED that if an appeal has been heretofore allowed in this cause by said District Court, and a cost bond given on such appeal, then no additional cost bond need be given on this appeal.

I HEREBY CERTIFY that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of October, A. D. 1938.

Paul P O'Brien

Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit

[Endorsed]: Filed R. S. Zimmerman, Clerk at 12 min. past 2 o'clock Oct. 24, 1938 P. M. M. J. Sommer, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

		4	,
In the Matter of	. ,) -	In Proceedings
CONSOLIDATED R	ROCK RROD-)	for the
UC1S CO., a Delawa	re corporation,) .	Reorganization
	·/)	of a
	Debtor,)	Corporation.
4 .	/ .)	No. 25816-H
UNION ROCK COM	PANY, a cor-) .	PETITION
poration,)	FOR LEAVE
		1).	TO APPEAL
	Subsidiary,)	TO THE
)	UNITED
and)	STATES CIR-
	.*		CUIT COURT
CONSUMERS ROCK)	OF APPEALS
COMPANY, INC., a	corporation,)	FOR THE
)	NINTH
	Subsidiary.).	CIRCUIT.

To the Honorable Judges of the District Court of the United States, Southern District of California, Central Division:

E. Blois duBois, an objector of record to confirmation of the Plan of Reorganization of the above named debtor corporations submitted by Consolidated Rock Products Co., a corporation. Union Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Company Bondholders' Protective Committee, dated March

March 15, 1937, and the owner and holder of bonds of Union Rock Company in the principal amount of \$150,-000.00 and of Consumers Rock & Gravel Company, Inc. in the principal amount of \$31,500.00, feeling himself aggrieved by the order and decree of the District Court of the United States for the Southern District of California, Central Division, entered herein on the 8th day of September, 1938, by the Honorable Harry A. Hollzer, one of the judges of said court, denying the exceptions of said E. Blois duBois to the report of the Special Master herein, approving said report and confirming the aforesaid Plan of Reorganization of the above named debtor corporations, hereby petitions for leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from such order and decree, and the whole thereof, for the reasons set forth in petitioner's assignment of errors filed herewith.

Petitioner prays that appeal to said United States Circuit Court of Appeals for the Ninth Circuit may be allowed him, that the amount of cost bond on appeal be fixed, that a citation be issued directed to Consolidated Rock Products Co., a corporation; F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers

Rock and Gravel Company, Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co., commanding them, and each of them, to appear before the said United States Circuit Court of Appeals for the Ninth Circuit to do and receive that which may appertain to justice in the premises, and that a transcript of the records, papers, proceedings, offers, stipulations and evidence upon which said order and decree was entered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 3, 1938.

John G. Mott (John G. Mott)

Paul Valleé (Paul Vallee)

Kenneth E. Grant (Kenneth E. Grant)

Attorneys for Petitioner.

E. Blois duBois Petitioner. UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

STATE OF CALIFORNA)

ss

County of Los Angeles

E. BLOIS duBOIS, being first duly sworn, upon oath deposes and says:

That he is the petitioner for leave to appeal named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true of his own knowledge.

E. Blois duBois

Subscribed and sworn to before me this 3rd day of October, 1938.

[Seal]

Katherine Spengler

Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min. past 1 o'clock Oct - 4, 1938 P. M. By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NOTICE OF APPEAL

Pursuant to the order of the above entitled Court heretofore entered allowing appeal, notice is hereby given that
E. Blois duBois, an objecting bondholder of record to the
plan of reorganization herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that
certain order entered herein September 8, 1938, and the
whole thereof, denying the exceptions of appellant to the
report of the Special Master, approving said Special
Master's report, and confirming the plan of reorganization proposed herein by the above debtor, Union Rock
Company Bondholders' Protective Committee and Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee.

Dated: Los Angeles, California, October 8, 1938.

JOHN G. MOTT
PAUL VALLEE
KENNETH E. GRANT
BY Kenneth E. Grant
Attorneys for E. Bois duBlois

[Endorsed]: Filed R. S. Zimmerman, Clerk at 14 min. past 11 o'clock Oct - 8, 1938 A. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

STIPULATION

It is hereby stipulated that the same Assignment of Errors was filed by appellant, E. Blois duBois, in the above entitled court and in the Circuit Court of Appeals for the Ninth Circuit, and that such Assignment of Errors shall be printed but once in the record on appeal herein.

Dated: December 23, 1938.

JOHN G. MOTT
PAUL VALLEE
KENNETH E. GRANT

By K. E. Grant

· Attorneys for Appellant

O'MELVENY, TULLER & MYERS HOMER I. MITCHELL

And Graham L. Sterling, Jr.

Attorneys for Appellees F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee.

GIBSON, DUNN & CRUTCHER By T. H. Joyce

Attorneys for Appellees Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock & Gravel Company, Inc., Bondholders' Protective Committee.

Stanley Arndt (Stanley Arndt)

Attorney for Appellees Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co.

LATHAM, WATKINS & BOUCHARD
And Paul E. Watkins

Attorneys for Appellees Consolidated Rock Products Co., Union Rock Company and Consumers Rock & Gravel Company, Inc.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 28 min. past 4 o'clock, Dec. 30, 1938 P. M. By M. J. Sommer. Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER ALLOWING APPEAL.

The Court having considered the Petition of E. Blois duBois, an objecting bondholder of record, for leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain Order entered in the above entitled proceedings September 8, 1938 confirming the Plan of Reorganization dated March 15, 1937 submitted by Consolidated Rock Products Co., a corporation, Union Rock Company Bondholders' Protective Committee and Consumers Rock & Gravel Company Bondholders' Protective Committee, and having considered the Assignment of Errors filed by said E. Blois duBois with said Petition for Leave to Appeal,

NOW, THEREFORE, IT IS HEREBY ORDERED:

That said E. Blois duBois, as an objecting bondholder of record to the said proposed Plan of Reorganization herein, be and hereby is granted leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit as prayed for in his said Petition from the Order and Decree, and the whole thereof, entered herein September 8, 1938, confirming the said Plan of Reorganization.

IT IS FURTHER ORDERED:

That said petitioner's Cost Bond on Appeal be and. hereby is fixed in the sum of \$250.00; and that a transcript of the record and of all papers, proceedings, arguments, offers, stipulations and evidence upon which the aforesaid Decree is based be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 4, 1938.

H. A. Hollzer

Judge of the United States District Court.

[Endorsed]: Filed R. S. Zimnierman, Clerk at 2 min. past 2 o'clock Oct - 4, 1938 P. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, E. Blois duBois, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Consolidated Rock Products Co., a corporation, F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the · Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co. in the full and just sum of \$250.00 to be paid to the said Consolidated Rock Products Co., a corporation, F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company. Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co., their successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of October in the year of our Lord one thousand nine hundred and thirty-eight.

WHEREAS lately, on September 8, 1938, at the District Court of the United States for the Southern Dis-

trict of California, Central Division, in proceedings depending in said Court for the reorganization of Consolidated Rock Products Co., a corporation, and its subsidiaries, Union Rock Company, a corporation, and Consumers Rock & Gravel Company, Inc., a corporation, an order and decree was rendered against the said E. Blois duBois, denying his exceptions to the Report of the Special Master therein, approving said Report and confirming the Plan of Reorganization submitted in said proceedings by Consolidated Rock Products Co., a corporation, Union Rock Company Bondholders' Protective Committee, and Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee, dated March 15, 1937, and the said E. Blois duBois having obtained from said District Court of the United States for the Southern District of California, Central Division, leave to appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said order and decree in the aforesaid proceedings, and a citation directed to said Consolidated Rock Products Co., a corporation; F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co., citing and admonishing them, and each of them; to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now the condition of the above obligation is such that if the said E. Blois duBois shall prosecute said appeal to

effect, and answer all costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Acknowledged before me the day and year first above written.

E. Blois duBois

(Principal)

Address P. O. Box 711 Fallbrook, California

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal]

By D. M. Ladd

Attorney-in-Fact

By S. M. Smith

A cent

UNITED STATES OF AMERICA SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

STATE OF CALIFORNIA

SS

County of Los Angeles

On this 4th day of October, 1938, before me, Katherine Spengler, a Notary Public in and for said County and State, personally appeared E. Blois duBois, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF. I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seai]

Katherine Spengler

Notary Public in and for the County of Los Angeles,
State of California

SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

STATE OF CALIFORNIA)

County of Los Angeles

On this 4th day of October, 1938, before me, Theresa Fitzgibbons, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and S. M. Smith, known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-fact and agent respectively of Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-fact and agent respectively.

[Seal] Theresa Fitzgibbons

Notary Public in and for the County of Los Angeles,

State of California.

My commission expires May 3, 1942

Examined and recommended for approval as provided in Rule 13.

K. E. Grant

The foregoing and above bond is hereby approved. October 4, 1938.

Judge of the District Court of the United States.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 10 min. past 3 o'clock Oct. 4, 1938 P. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE .

TO THE CLERK OF SAID COURT:

Sir:

Please print 70 copies of Record on Appeal in the above matter

Mott, Vallee & Grant Kenneth E. Grant

Attorneys for Appellant

[Endorsed]: Filed Dec. 23, 1938 at 3:30 p. m. R. S Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of District Court and Cause.] CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of Californía, do hereby certify the foregoing volume containing 358 pages, numbered from 1 to 358 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation issued in the United States District Court; citation issued in the United States Circuit Court; petition of Debtor and Bondholders' Committees submitting plan of reorganization dated March 15, 1937; objections to plan of reorganization; petition for hearing for proposal, consideration and confirmation of the plan of reorganization; supplemental objections of E. Blois duBois to plan of reorganization; findings and report of Special Master; exceptions of objector E. Blois duBois to findings and report of Special Master, etc.; supplemental exception of objector E. Blois duBois to findings and report of Special Master, etc.; motion to reopen hearing with respect to confirmation of proposed plan of reorganization; affidavit in support of motion to reopen hearing on plan of reorganization proposed, etc.; motion to dismiss, etc.; order of August 5, 1938; memorandum of conclusions; findings and order confirming plan of reorganization of Consolidated Rock Products Co.,

Union Rock Company and Consumers Rock Gravel Company, Inc.; agreed statement of the case; petition for leave to appeal in the United States Circuit Court; assignment of errors in the United States Circuit Court; order allowing appears in the United States Circuit Court; petition for leave to appeal in the United States District Court stipulation re: assignment of errors in the United States District Court States District Court; order allowing appeal in the United States District Court; order allowing appeal in the United States District Court; cost bond on appearand praecipe.

I Do Further Certify that the amount paid for printing the foregoing record on appeal is \$535.5 and that said amount has been paid the printer to the appellant herein and a receipted bill is herewise enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \$50.10 and that said amount has been paid me by the appellant herein

In Testimony Whereof, I have hereunto set me hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, the 14th day of February, in the year of Our Lord On Thousand Nine Hundred and Thirty-nine and our Independence the One Hundred and Sixty-third

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By EDMUND L. SMITH,
Deputy.

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United States Circuit Court of Appeals For the Ninth Circuit

E. BLOIS DU BOIS, an objecting bondholder of record to the Plan of Reorganization,

Appellant,

VS:

CONSOLIDATED ROCK PRODUCTS CO., a corporation; F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, June 5, 1939.

Before: Garrecht, Haney and Stephens, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. Kenneth E. Grant, counsel for appellant, and by Messrs. Graham L. Sterling, Jr., and J. C. Macfarland, counsel for appellees, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, February 19, 1940.

Before: Garrecht, Haney and Stephens, Circuit Judges.

[Title of Cause.]

ORDER GRANTING PETITION FOR REHEARING, ETC.

Upon consideration of the petition of appellant, filed December 1, 1939, and within time allowed therefor by rule of court, for a rehearing of above cause, and of the answer of Union Rock Company

and Preferred Stockholders' Committee thereto, filed December 12, 1939, and by direction of the Court,

It Is Ordered that said petition for a rehearing be, and hereby is granted; that the opinions of this court heretofore rendered and filed on November 4, 1939 be, and they hereby are withdrawn; that the decree of this court heretofore filed and entered on November 4, 1939 be, and hereby is vacated and set aside.

It Is Further Ordered that each party herein file within fifteen days from date, a typewritten brief furnishing four clear legible copies, upon letter size paper, $8 \times 10^{1/2}$, bound on the left margin as a book upon the question as to how the decision of the Supreme Court of the United States in Case, et al., vs Los Angeles Lumber Products Co., Ltd., 308 U. S 106, 60 S. Ct. 1, 84 L. Ed. 22, affects the decision appealed from in the above entitled cause. No reply briefs to be filed.

It Is Further Ordered that upon the filing of the respective briefs above called for this cause is to stand resubmitted without further oral argument.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, June 19, 1940.

Before: Garrecht, Haney and Stephens, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, Ordered that the typewritten opinion* this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.] OPINION

Upon Petition For Rehearing

Before: Garrecht, Haney and Stephens, Circuit Judges.

Haney, Circuit Judge.

An objecting bondholder has appealed from an order confirming a plan of reorganization under §77B of the Bankruptcy Act.

^{*}Opinion modified by Order of Monday, August 5, 1940.

In the year 1929, Union Rock Company, hereinafter called Union, Consumers Rock & Gravel Company, Inc., hereinafter called Consumers, and Reliance Rock Company, hereinafter called Reliance, all of which were Delaware corporations, were engaged in the business of mining, processing, shipping, and selling rock, sand and gravel. Prior to, or about the time of what the parties call the "consolidation" hereinafter mentioned, Union acquired all the outstanding stock of Reliance. These three corporations carried on about 75% of all the rock; sand and gravel business carried on in Southern California.

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Both Union and Consumers had 6% first mortgage bonds outstanding. The acreage of the properties owned by each are shown as follows:

	Fee	Lease	Total
Union and subsidiaries	2121.10	470.75	2491.55
Consumers	321.32	919.84	1241.16

In 1928, independent appraisers appraised the properties of Union and Consumers at approximately \$15,000,000. The record does not disclose how these values were allocated between Union and Consumers. Balance statements made on March 31, 1929, show values of fixed assets as follows:

Union	\$ 6,644,868.99
Reliance	1,533,389.60
Consumers	4,988,134.66

^{\$13,166,393.16}

At the same time the amount of bonds outstanding in the hands of the public was as follows:

Union

\$2,388,000 00

Consumers

1,492,000.00

The consolidation referred to was accomplished by organization of a Delaware corporation, Consolidated Rock Products Co., hereinafter called the debtor, with no par preferred stock, having a liquidation preference of \$25 per share and a dividend rate of \$1.75 per share, and no par common stock, which stock was either exchanged for the stock in Union and Consumers, or sold and part of the proceeds thereof used to acquire stock in Union and Consumers. Some of the proceeds of the sale were used to purchase operating equipment. Debtor then made an agreement by which it became entitled to operate directly the properties of Union and Consumers, and was required to meet payments of principal and interest on the bonds.

In 1931 a revaluation of the properties was made by officers of the debtor, who fixed the value of all properties at \$4,414,425.00. The record does not disclose how those values were allocated between the orporations.

On February 16, 1933 an agreement was executed urporting to be a modification of the operating greement. The operating agreement required the ebtor to make allowance for depreciation, deple-on and obsolescence but did not prescribe the value asis to be used. The accountants had used the then

book value as a basis. The modification provided for an "actual value" basis, to be obtained yearly by a Board of Appraisers. Default in the payment of the interest due on the Union bonds occurred on March 1, 1934. A similar default occurred with respect to the Consumers bonds on July 1, 1934. There were defaults also in required retirements.

Appellant acquired Union bonds having a maturity value of \$150,000 after default thereon had occurred. Of that amount he acquired \$72,000 of bonds prior to the date upon which debtor's petition under \$77B was filed, and \$78,000 of such bonds after such date. He also acquired \$31,500 of Consumers bonds after default thereon but before the filing of proceedings under \$77B. He testified that he purchased the bonds after careful inquiry and with the full belief and conviction that a building "boom" would soon occur, and that he did not purchase them for purposes of speculating or market fluctuations. The \$181,500 of bonds were purchased by appellant for \$28,300.

On May 24, 1935, the debtor, Union and Consumers filed petition to reorganize under §77B of the Bankruptcy Act. On April 28, 1937 the petition submitting the plan of reorganization was filed. Appellant filed objections, and asked that the various properties be impartially appraised, and that an independent auditor be appointed to report the indebtedness. On September 30, 1937 the amount of principal and interest due on bonds held by the public was:

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	Principal	Interest
Inion Ionsumers	\$1,877,000 1,127,000	\$459,865 255,825
	\$3,014,000	\$715,690

about this time the debtor's books showed that it wed Union and Consumers about \$5,000,000, the alidity and amount of such debt being disputed by the debtor.

The plan of reorganization contemplated: Organition of a new corporation; transfer to it of all nion properties (including those of its subdiaries), Consumers' and debtor's properties free any claims; issuance by the new corporation of a ortgage covering all the properties as security for ,507,000 in 5% bonds payable from income only, d divided into two series; Series U bonds in the mount of \$938,500 were to go to Union bondlders; Series C bonds in the amount of \$568,500 ere to go to Consumers bondholders; issuance by e new corporation of 30,140 5% preferred stock ving a par value of \$50,000, in two series; 18,770 ares of Series U preferred stock was to be issued Union bondholders, and 11,370 shares of Series C eferred stock was to be issued to Consumers bondders; issuance by the new corporation of 425,718 ares of common stock having a par-value of \$2 per re, as follows: 285,947 shares to debtor's prered stockholders; 37,540 shares to be reserved for nance upon the exercise of stock purchase war-

rants to be attached to Series U preferred stock: 22,740 shares to be reserved for issuance upon exercise of stock purchase warrants to be attached to Series C preferred stock; 79,491 shares to be reserved for issuance upon the exercise of stock purchase warrants to be issued to the debtor's common stockholders. The net income was to be divided into equal parts; one part was to be applied: to interest on Series U bonds, then to sinking fund for retirement of Series U bonds, then to dividends on preferred stock, then to'a sinking fund for retirement of Series U preferred stock after Series U bonds were retired. The other part of the net income was to be applied in the same manner and order on the Series C bonds and preferred stock. The plan also apparently provides for cancellation of the interest due on Union and Consumers bonds, and of any indebtedness owing Union and Consumers by the debtor, although it is not clear where the record so shows.

Under a plan, the holder of a \$1000 Union bond was to receive: (1) a Series U bond of the new corporation in the amount of \$500; (2) 10 shares (having a total par value of \$500) of Series U preferred stock of the new corporation; and (3) a stock purchase warrant entitling the holder to purchase 20 shares of common stock of the new corporation at any time within five years at stipulated prices varying from \$2 to \$6 per share, depending on the time of exercise. The holder of a \$1000 Consumers bond

obtained the same treatment except that he received Series C bonds and preferred stock.

At the hearing valuations of the properties were given by Mitchell, who was vice president and secretary of the debtor, secretary of Union and secretary of Consumers, by Rogers who had been employed by Union for many years prior to the consolidation, and by Gautier, an executive officer of the debtor. The valuations of the properties of Union (including Reliance), and Consumers so given were:

Witness	v.=	Union	Consumers
Mitchell		\$2,150,200	\$1,267,100
Rogers		2,518,000	750,000
Gautier		1,940,000	1,436,000
Average,		2,202,733	1,151,033
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Taking the average of these valuations, the following shows a comparison with the amount of principal and interest due on the bonds:

Union			Consumers		
Valuation	Bond Pr. & Int.	0	* Valuation	Bond Pr. & Int.	
\$2,202,733	\$2,336,865		\$1,151,033	\$1,392,825	

The parties seem to assume that the properties are valuable enough to pay the bonds in full, and it may be they are considering only the principal. From the above valuation, it can be seen that both principal and interest now due would be amply secured only if the debtor is indebted to Union and Consumers.

The special master to whom the cause had been referred found that the assets of Union, Consumers,

Reliance and the debtor "are entirely insufficient and inadequate to pay the face value of the bonds. plus all accrued interest and the liquidation preferences, plus accrued dividends upon the preferred stock of" the debtor; that the value of the assets, admittedly subject to the trust indentures "is insufficient to pay the par value of the bonds, plus accrued interest"; that "the fair present going-concern value of all of the properties, if operated as a unit, is in excess of the total bonded indebtedness plus accrued and unpaid interest thereon up to April 1, 1937, the latter being the date of the new bonds to be issued under the plan of reorganization". He further found that it was to the bondholder's interest to operate the properties as a unit because by such operation they would receive a larger yield and return both as to principal and interest on the bonds, and recommended approval of the plan of reorganization.

The trial court found that the properties of Union, Consumers and Reliance had been commingled and that it was impossible to segregate "with any degree of accuracy of fairness properties which originally belonged to the companies separately"; and confirmed the findings of the special master with respect to values stated above. The court approved the plan as fair and equitable and from the order to that effect, appellant appeals.

On November 4, 1939, a majority of this court, one judge dissenting, affirmed the order. 107 F(2d) 96, Advance Sheet, not contained in permanent

volume. Two days thereafter and on November 6, 1939, Case v. Los Angeles Lumber Co., 308 U. S. 106, was decided. On February 19, 1940, we granted appellant's petition for a rehearing, vacated the decree entered pursuant to our opinion, withdrew the opinion, and directed the parties to file briefs regarding the applicability and effect of Case v. Los Angeles Lumber Co., supra, on the instant case. The Securities and Exchange Commission sought and was granted leave to file a brief as amicus curiae. In addition, one Edgar Shook sought and was granted leave to file a brief as amicus curiae. Shook is interested in a similar reorganization plan for an unrelated corporation, the proceedings being in the jurisdiction of a Kansas court.

The debtor, preferred stockholders' committee, the bondholders' protective committee, and amicus curiae Shook, have filed briefs in support of the plan of reorganization, and all will hereafter be referred to as appellees without identification. Appellant and amicus curiae, Securities and Exchange Commission have filed briefs opposing the plan and will hereafter be referred to as appellants without identification.

Before discussing the various contentions in detail, it should be remembered that Union bondholders had a first and prior claim on Union's assets, which included stock of Reliance, as well as a portion of the claim for \$5,000,000, against the debtor, if valid. Likewise Consumers bondholders had a first and prior claim against Consumers' assets, which

included a portion of the claim for \$5,000,000 against the debtor, if valid. If the claim mentioned was valid then both groups of bondhold is through Union and Consumers would have in addition a claim against any assets owned by the debtor prior to any claim of debtor's preferred stockholders, to the extent of the liability. It can be seen, therefore, that until the claim is settled, either voluntarily or by litigation, there is no way to determine the fairness of any plan of reorganization, because until it is known what assets are subject to payment of the bonds, we have no way of knowing what the bondholders will lose, if anything.

Likewise, the lack of findings as to the precise value of assets covered by the trust indentures, the value of assets not covered by such indentures but subject to the bonded indibtedness, and the value of assets free of any claims of the bondholders, seriously hampers any judgment on the matter. In this respect, the findings are inconsistent. It has been found that the assets have been so commingled that identification thereof is impossible, yet findings are made to the effect that assets subject to the trust indentures are insufficient to pay the principal of and interest on the bonds. However, since the plan proposed, we think, is unfair as a matter of law for reasons hereafter stated, we assume that both matters mentioned will be satisfactorily disposed of upon remand of the cause.

In Case v. Los Angeles Lumber Co., supra, the debtor owed bondholders and had two classes of

stock outstanding, both having equal voting power. Class A stock had been issued in return for a contribution of \$400,000, and Class B stock had been issued in payment of unpaid interest on bonds. Bonds outstanding amounted to \$3,807,071.88 including interest. There were outstanding 57,788 shares of Class A stock and 5,112 shares of Class B stock. The debtor was insolvent "both in the equity and in the bankruptcy sense". (p. 109). The plan of reorganization contemplated the formation of a new corporation with preferred and common stock having a par value of \$1 per share. The bondholders were to receive 641,375 shares of a total of 811,375 shares of preferred stock, for their claims as bondholders. The remaining preferred stock was to be sold for cash. Class A stockholders were to receive all the new common stock consisting of 188,625 shares. No provision was made for Class B stock. Holders of 92.81% of the face amount of the bonds, 99.75% of the Class A stock, and 90% of the Class B stock approved the plan.

The plan was held unfair as a matter of law because, while the bondholders were entitled to all the assets, the plan required them "to surrender to the stockholders 23 per cent of the value of the enterprise". (p. 119). The court said, however, that a stockholder could participate in a plan of reorganization of an insolvent debtor, but that in such case, in order to accord the creditor his full right of priority against the corporate assets "the stockholder's participation must be based on a contribu-

tion in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder". Here we are interested in the first point mentioned.

Section 77B(f) requires a plan of reorganization to be "fair and equitable" among other things. The court held that the words "fair and equitable" were used in §77B in the same sense and had the same meaning as they had "in the field of equity receivership reorganizations"; that in such reorganizations, the words "fair and equitable" included "the rules of law enunciated by this Court in the familiar cases of Railroad Co. v. Howard, 7 Wall. 392; Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674; Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482; Kansas City Terminal Ry. Co. v. Boyd, 228 U. S. 482; Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445."

It is unnecessary to discuss fully the cases cited, because they are fully discussed in Case v. Los Angeles Lumber Co., supra. It is enough to say that the latter case, with respect to full priority holds that: a stockholder's interest, in corporate property is subordinate, first, to the rights of secured creditors, and second, to the rights of unsecured creditors (p. 116); that creditors are entitled to be paid from the property before the stockholders can retain it for any purpose whatever (p. 116); that such right of the creditors to priority over stockholders extends to "all the property" of the debtor, and to "the full value" thereof (p. 120); and that any

plan "by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation". (p. 116).

It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture, was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., supra. Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan, some of which appear to be sound.

Appellees attempt to distinguish Case v. Los Angeles Lumber Co., supra, on the ground that there the debtor was insolvent, whereas here, the debtor is solvent. Assuming, without so deciding because of the state of the record as mentioned, that

the debtor here is solvent, we think the distinction is without merit. Several reasons compel that conclusion, the most important being that a corporation may come within the terms of §77B although it is not insolvent, but "unable to meet its debts as they mature". Continental Bank v. Rock Island Ry., 294 U. S. 648, 672. The statute requires a proposed plan to be "fair and equitable" regardless of the condition of the corporation, whether it be solven or insolvent. The statute does not limit the test, "fair and equitable", to plans of reorganization of insolvent corporations, but lays down the requirement that a plan must be "fair and equitable" for all corporations seeking relief under §77B. We think a proposed plan of reorganization under §77B must be "fair and equitable", whether the corporation sought to be reorganized is solvent or insolvent.

Some suggestion is made that because Du Bois paid only a small amount of money for his bonds, we should approve the plan. We cannot accede to that view, first, because the court must of necessity give "an informed, independent judgment" as to the fairness of the plan (Case v. Los Angeles Lumber Co., supra, 115), and because whatever Du Bois paid is immaterial to a consideration of the real question—is the plan fair and equitable? Security-First Nat. Bank v. Rindge Land & Navigation Co., 9 Cir., 85 F(2d) 557, 561; Wade v. Chicago, Springfield etc. Railroad, 149 U. S. 327, 343.

Considerable argument is made to the effect that the debtor's preferred stockholders are "forgotten men"; that they lose 96% of their investment; and that they have an equity and must be given an interest in any plan of reorganization. We are not impressed by this argument. When a person buys a bond, he obtains it on the theory that he is not an owner but a creditor. When a person buys stock, common or preferred, he knows that he is buying an interest in the corporation which is subordinate to claims of the corporate creditors. He runs the risk of having an interest in something that is valueless.

As to whether the preferred stockholders are required to be recognized in a plan of reorganization the question depends on whether they have an equity. If they do not, then their participation "must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder". Case v. Los Angeles Lumber Co., supra, 122. On the other hand, if the preferred stockholders have an equity after satisfaction of creditors, then they should be considered in the plan of reorganization, Taylor v. Standard Gas Co., 306 U. S. 307, 383. Under the incomplete findings presented here, we have no way of knowing how much, if any, equity the preferred stockholders have, so it is unnecessary to consider what limitations, if any, control the award of an interest to preferred stockholders in the event that they might have an equity.

It is also urged that the bondholders, under the proposed plan, are superior in every way to the pre-

ferred stockholders. While "relative priorities of the bondholders" and the preferred stockholders may be accorded, such "relative" priority is clearly insufficient. Case v. Los Angeles Lumber Co., supra, 119-120. It is further said that the plan must be held to be fair because it achieves, by one step, results which could be achieved under California law by several steps. Such fact, if it be a fact, is immaterial. This proceeding is pending under the federal law and must meet the requirements of that law.

Finally, appellants urge that the trial court should be directed to cause an appraisal of the property to be made, because consideration of values "was not fully supported by adequate underlying data, especially as concerns earning power" and because more than three years have elapsed since the question of values was considered. While we agree that the "values" of the various properties is necessary to a complete determination as to the fairness of any plan, and that a "fresh examination into such question" should be made, no arguments are made on the question as to whether we have power to direct an appraisal. Under these circumstances we think we should leave the question open and, while expressing the opinion that, an appraisal should be made, merely say that precise findings as to values must be made.

Reversed.

[Endorsed]: Opinion. Filed Jun. 19, 1940. Paul P. O'Brien, Clerk. (As modified by order of Aug. 5, 1940.)

United States Circuit Court of Appeals for the Ninth Circuit

No. 9000

E. BLOIS duBOIS,

vs.

CONSOLIDATED ROCK PRODUCTS CO.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with costs in favor of the appellant and against the appellees.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellant recover against the appellees for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered June 19, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, August 5, 1940.

Before: Garrecht, Haney and Stephens, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING MODIFICATION OF OPINION, AND DENYING PETITION FOR REHEARING.

Upon consideration of the motion for modification of the opinion of June 19, 1940, and by direction of the Court, It Is Ordered that the opinion of this court of June 19, 1940, be, and hereby is modified by striking therefrom the first paragraph commencing on page 7, and in lieu thereof inserting the following:

"Before discussing the various contentions in detail, it should be remembered that Union bondholders had a first and prior claim on Union's assets, which included stock of Reliance, as well as a portion of the claim for \$5,000,000 against the debtor, if valid. Likewise Consumers bondholders had a first and prior claim against Consumers' assets, which included a portion of the claim for \$5,000,000 against the debtor, if valid. If the claim mentioned was valid then both groups of bondholders through Union and Consumers would

have in addition a claim against any assets owned by the debtor prior to any claim of debtor's preferred stockholders, to the extent of the liability. It can be seen, therefore, that until the claim is settled, either voluntarily or by litigation, there is no way to determine the fairness of any plan of reorganization, because until it is known what assets are subject to payment of the bonds, we have no way of knowing what the bondholders will lose, if anything."

It Is Further Ordered that in other respects the said petition for modification of opinion be, and hereby is denied.

It Is Further Ordered that the petition of Consolidated Rock Products Co., and Edward E. Hatch and Louis van Geider, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co., filed July 19, 1940, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]
ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Latham, Watkins and Arndt, counsel for the Appellees, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including September 7, 1940; and in the event the petition for a writ of certiorari to be made by the Appellees herein be docketed in the Clerk's office of the Supr me Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT United States Circuit Judge.

Dated: San Francisco, California, August 6, 1940. [Endorsed]: Filed Aug 6 1940. Paul P. O'Brien, Clerk. [Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT

COURT OF APPEALS FOR THE NINTH

CIRCUIT, TO RECORD CERTIFIED UN
DER RULE 38 OF THE REVISED RULES

OF THE SUPREME COURT OF THE

UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred eighty-four (384) pages, numbered from and including 1 to and including 384, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of August A. D. 1940.

[Seal] RAUL P. O'BRIEN,

Clerk

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 400

ORDER ALLOWING CERTIOBARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 444

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 400

In the Matter of
CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,

Debtor.

UNION ROCK COMPANY, a corporation

Subsidiary.

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,
Subsidiary.

CONSOLIDATED ROCK PRODUCTS Co., a corporation, and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

E. BLOIS du BOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PAUL R. WATKINS, DANA LATHAM,

1112 Title Guarantee Building, Los Angeles,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

In the Matter of CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,

Debtor.

UNION ROCK COMPANY, a corporation

Subsidiary.

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,

CONSOLIDATED ROCK PRODUCTS CO., a corporation, and EDWARD.

E. HATCH and LOUIS VAN GELDER, composing the Preferred

Stockholders Committee of Consolidated Rock Products Co.,

Petitioners.

E. BLOIS du BOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Consolidated Rock Products Co., a corporation, organized under the laws of the State of Delaware, and Edward E. Hatch and Louis Van Gelder, composing the preferred stockholders committee of Consolidated Rock Products Co., as your petitioners, respectfully pray that a writ of certiorari issue to review a judgment entered June 19, 1940, in the United States Circuit Court of Appeals for the Ninth Circuit in case No. 9,000, entitled "E. Blois du

Bois, an objecting bondholder of record to the Plan of Reorganization, appellant, vs. Consolidated Rock Products Co., a corporation; F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight, and Walter S. Faylor, composing the Union Rock Company Bondholders' Protective Committee; Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock and Gravel Company, Inc. Bondholders' Protective Committee; and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders Committee of Consolidated Rock Products Co., appellees," and the order of said court directing modification of opinion and denying petition for rehearing dated Monday, August 5, 1940.

Opinions Below.

The first opinion of the Circuit Court of Appeals affirming the trial court is reported in 107 Fed. (2d) 96, Advance Sheet; the second opinion of the Circuit Court of Appeals reversing the trial court is not yet reported but appears in the record at page 365; and order directing modification of opinion and denying opinion for rehearing is not yet reported but appears in the record at page 382.

Jurisdiction.

The final judgment of the Circuit Court of Appeals was filed on June 19, 1940; a petition for rehearing was filed in the Circuit Court on July 19, 1940 and denied on August 5, 1940. This petition for writ is filed within three months after the filing of both the final opinion and the order denying the rehearing. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

- (1) Does the rule of "fair and equitable" Plans of (Reorganization established in Case v. Los Angeles Lumber Products Co., Limited, 308 U. S. 106, require or permit the Circuit Court of Appeals to find that a plan is unfair and inequitable as a matter of law where the debtor is found solvent, where the stockholders are found to have an equity, and where they are permitted to participate because of that equity and because of a compromise of a bona fide dispute.
- (2) Can the Circuit Court of Appeals overrule the findings of fact of the trial court and thereby usurp its functions where a corporation is found solvent, where stockholders have been found to have an equity, where there was found to be a compromise of a bona fide dispute and where the record shows that the trial court acted on an informed and independent judgment.
- (3) May a corporation being reorganized under Section 77B, 48 Stat. 912, 11 U.S.C.A. §207, of the Bankruptcy Act and having subsidiaries reorganized in the same proceeding, merge the various properties of all the companies into one company, substituting for separate bond issues on the separate company's properties, one bond issue on all the properties.

Statement.

Briefly stated, the facts upon which the foregoing questions arose are as follows. (The facts are taken from the said first opinion of the Circuit Court of Appeals in this matter, dated Nov. 4, 1939 and reported in 107 Fed. (2d) 96, Advance Sheets.)

In the year 1929 Union Rock Company (hereinafter referred to as Union), Consumers Rock & Gravel Company, Inc. (hereinafter referred to as Consumers), and Reliance Rock Company (hereinafter referred to as Reliance), all Delaware corporations, were engaged in the business of producing and marketing rock, sand, and gravel in Southern California as independent and competing organizations. Union and Consumers each then had outstanding a bonded debt consisting of first mortgage gold bonds. Reliance had no bonded indebtedness. ary 28, 1929, Consolidated Rock Products Co. (hereinafter referred to as Consolidated), was incorporated under the Delaware corporation laws for the purpose of acquiring the issued and outstanding shares of the capital stock of Union, Consumers, and Reliance. This it did, with the exception of a few shares, by issuing to various brokerage houses in exchange therefor 280,000 shares of its preferred stock and approximately 396,000 shares of its common stock. The brokerage houses in turn sold the Consolidated stock to the public for some seven million dollars. In addition Consolidated sold 20,000 shares of its preferred stock to the public for \$500,000.00, to provide working The properties of the three companies were capital. appraised in 1928 at fifteen million dollars. At the time Consolidated acquired the stock of said three companies, the bonded indebtedness of Union and Consumers, above mentioned, was outstanding.

Consolidated, owning or controlling substantially all of the outstanding stock of these three companies, designated their respective boards of directors and officers. Under date of July 15, 1929, effective as of April 1, 1929, Consolidated made with these three companies what was termed an operating agreement. Under said agreement the three companies ceased operations; all cash, securities, notes, accounts receivable, contracts, etc., of said companies were to be turned over to Consolidated, and that company was to maintain in first class condition the properties of the owning companies. In addition, Consolidated was to keep proper books and accounts so as to record, in accordance with approved accounting methods, the transactions between the parties to the agreement, including entries effecting depreciation, depletion, amortization, and obsolescence of all the properties. This operating agreement also provided:

"It is distinctly understood and agreed that this agreement is entered into for the mutual benefit of the parties hereto, that it is not made expressly or at all for any third person as that term is used in Section 1559 of the Civil Code of the State of California, and that said parties hereto and their respective successors and assigns alone shall exercise and enjoy the rights and privileges hereof."

Under date of February 16, 1933, a "Modification of Operating Agreement" was entered into by these companies for the evident purpose of fixing a lower basis of depreciation than that theretofore placed upon the properties in order to keep within the letter of the trust indenture securing the bond issues and for accounting and income tax convenience. The "Modification" provided for an appraisal and specified that the appraised valuation was to be the basis of depreciation, regardless of book values, that the depreciation was to be credited to the owning companies, and that payment thereof might be made over

a period of ten years, at the option of the operating company.

On March 15, 1937, the following securities were ourstanding and are affected by the plan of reorganization:

- (a) Union bonds in the aggregate principal amount of \$1,979,500.00.
- (b) Consumers bonds in the aggregate principal amount of \$1,200,500.00.
- (c) 285,947 shares of preferred stock of Consolidated.
- (d) 387,455 shares of common stock of Consolidated.

Default was made in the payment of the principal of the Union bonds which became due and payable on September 1, 1933, and default was made in the payment of semi-annual interest installments due and payable on said bonds on March 1, 1934. Default was made in the payment of semi-annual interest installments due and payable on the Consumers bonds on July 1, 1934.

E. Blois du Bois, the objecting bondholder and respondent herein, owns and holds Union bonds of the face value of \$150,000.00, which he purchased at various times between September 20, 1934, and December 9, 1935, at an average cost of \$145.00 per \$1000 par value. Between July 1, 1934, and April 17, 1935, he purchased \$31,500.00 face amount of Consumers bonds at an average cost of \$210.00 per \$1000 par value. All of said bonds were held and owned by said du Bois at the time of the confirmation of the plan.

On May 24, 1935, Consolidated, Union, and Consumers filed in the court below their respective petitions for relief.

under Section 77B of said Bankruptcy Act. No admission or allegation was made by said corporation, or any of them, that their assets amounted to less than their liabilities, but allegations were made that their assets had a value in excess of the amount which could be realized at that time upon a forced sale thereof or upon liquidation, and that if said corporations were not reorganized, the rights of their creditors and stockholders would be seriously impaired. Allegations were likewise made that said corporations were unable to meet their debts as they matured, and that they desired to effect a plan of reorganization pursuant to said Section 77B. After due notice and hearing, the debtor was continued in possession.

The Union bondholders, Consumers bondholders, and holders of Consolidated preferred stock each formed a committee to protect their respective interests. In presentation of a plan of reorganization, each group sought to preserve and advance its own interests and great difficulty was experienced in reaching a compromise of these conflicting interests. Finally, under date of March 15, 1937, the Consumers committee, the Union committee, and Consolidated submitted a plan of reorganization which is that before the Court herein. On August 25, 1937, the respondent herein filed objections to the said plan of reorganization. Consolidated and bondholders' committees of both Union and Consumers filed a joint petition for hearing, consideration and confirmation of the plan of reorganization, and requested therein that the objections to said plan be heard at the same time. On November 3, 1937, the court below filed an order referring said plan of reorganization, and the objections thereto (except objections going to constitutionality), to a special master for findings and

report: The special master held a hearing, made findings of fact, and recommended that the plan of reorganization be confirmed. Respondent herein offered objections to said special master's report and filed a motion to reopen the hearing. This was denied by the trial court August 5, 1938. On August 8, 1938, the trial court filed a "Memorandum of Conclusions" in which it was held that the proposed plan of reorganization was fair, just and equitable; the exceptions to the report of the master were denied; the report approved, and the plan confirmed. On September 8, 1938, the court made its findings of fact and order in the case.

The provisions of the Plan of Reorganization material here are as follows: A new corporation will be formed to which all of the assets of Consolidated and its subsidiaries will be transferred. The bondholders of Union and Consumers will surrender their bonds, cancel accrued interest to April 1, 1937, and receive in lieu of each such bond a new bond with 5% cumulative interest in one-half of the principal amount of the original bond; new preferred stock of a par and preference value equal to onehalf of the principal amount of the original bond and common stock purchase warrants. The new bonds and the new preferred stock will be issued by the new corporation and will constitute a lien and a preference, respectively, against all of the assets of the new corporation. The old preferred stockholders of Consolidated will receive one share of common stock of the new corporation for each share of old preferred stock. The old common stockholders of Consolidated will receive stock purchase warrants entitling them for a limited time to purchase for cash one share of new common stock for each five shares

of old common owned. Consolidated surrenders for cancellation 166,000 par value of Union and Consumers bonds and transfers all of its assets to the new corporation to become subject to the aforesaid lien and preference of the Union and Consumers bondholders.

Respondent herein appealed to the Circuit Court of Appeals for the Ninth Circuit, which after briefs and arguments thereon, affirmed the order of the trial court on November 4, 1939. The case of Case v. Los Angeles Lumber Products Company (supra), was decided shortly thereafter. The Circuit Court of Appeals thereupon granted a rehearing on briefs but without oral argument and after submission of briefs on the basis of said decision reversed itself and disapproved the plan.

Briefly summarized, the facts are:

- 1. Union and Consumers with outstanding bond issues at the time their capital stock was acquired by Consolidated. Reliance has no bonded debt.
- 2. Consolidated with no bonded debt at any time, its financial structure consisting of preferred and common stock only.
- 3. No assumption by Consolidated of the bonded indebtedness of Union or Consumers.
- 4. The only possible liability by Consolidated to Union or Consumers—not the bondholders—arising out of an operating agreement.
 - (a) Said operating agreement providing that it is for the mutual benefit of the parties to it, i. e., Consolidated, Union, Consumers and Reliance, respectively and not for the benefit of any third party.

- (b) The operating agreement modified by an agreement of February 19, 1933 providing for
 - I. A method of determining depreciation on a fair basis rather than book value at the time of acquisition, and
- II. A method of liquidating any sum which might be due thereunder.
- 5. A plan of reorganization evolved after several years of bitter bickering and threats of litigation.
- 6. Requisite consents filed in the proceeding by all interested parties including the bondholders of Union and Consumers.
- 7. Extended hearings before 2 special master on the plan; extended hearings in the trial court on the special master's report recommending confirmation and then the confirmation.
- 8. An appeal by one objector who acquired his bonds at an average cost of fifteen cents on the dollar after default and just before and after the 77B proceedings.
- 9. The Circuit Court of Appeals affirming the trial court.
- 10. The Circuit Court of Appeals reversing itself and the trial court as a result of the case of Case v. Los Angeles Lumber Products Co. (supra).
- 11. The basis for the Circuit Court of Appeals reversal of itself and the trial court being
 - (a) The plan is not fair and equitable as a matter of law based on the authority of Case v.

Los Angeles Lumber Products Co. (supra) even though the stockholders are found to have an equity and even though there was a compromise of a bona fide dispute,

(b) The plan cannot be confirmed because it provides for a blanket mortgage to cover all the properties of all the companies in exchange for the bonds against the properties of the two separate companies.

Specifications of Error to Be Urged.

- 1. The Circuit Court of Appeals erred in finding that the plan here involved is unfair and inequitable as a matter of law because of the rule established in Case v. Los Angeles. Lumber Products Co. (supra), in the face of findings of solvency of the debtor, an equity in the stockholders and the compromise of a bona fide dispute.
 - 2. The Circuit Court of Appeals erred in finding that the plan was unfair and inequitable as a matter of law because by virtue of the "full priority" rule established in Case v. Los Angeles Lumber Products Co. (supra), the two original bond indentures could not be merged into one new indenture covering all the properties of all the companies.
 - 3. The Cincuit Court of Appeals erred in finding the plan was unfair and inequitable upon the findings before the court because by so doing it usurped the functions of the trial court.

Reasons Relied Upon for Allowance of the Writ.

It is respectfully submitted by your petitioners and relied upon as a reason for the granting of the writ that:

- 1. The act of the Circuit Court of Appeals in reversing its own decision and that of the trial court on the basis of the authority of the case of Case v. Los Angeles Lumber Products Co. (supra), erroneously construes that decision in that:
 - (a) It holds that as a matter of law it is required to disapprove a plan of reorganization of a solvent company wherein its stockholders are given the right to salvage an equity.
 - (b) It holds that as a matter of law it is required to disapprove a plan in which the stockholders of a company with no liens against its properties are permitted to participate in the plan as a result of a compromise of an alleged liability of that company to its subsidiaries against whose properties the liens exist.
 - (c) It holds that as a matter of law it is required to disapprove a plan involving a solvent corporation because in its opinion there was little merit in a controversy or in the compromise thereof.
 - (d) It holds that as a matter of law two separate mortgage liens cannot be merged into one new blanket lien against the properties of the same companies and another when these companies are merged.
- 2. The act of the Circuit Court of Appeals in disapproving the plan on the basis of the authority of Case v. Los Angeles Lumber Products Co. (supra), after approving the plan prior to that decision, makes that decision the sole and direct basis for reversal and therefore establishes the "fixed principle" rule of that

case as applying as a fixed principle in 77B cases involving solvent corporations and compromises among the interested parties.

- approving the plan results in a shameful inequity toward the stockholders of a solvent corporation in favor of bondholders, not of that corporation, but of its subsidiaries and is tantamount to the substitution of that court's judgment on a question of fact for the judgment of the parties involved, the special master and the trial court. This is contrary to In re 620 Church St. Bldg. Corporation, et al., 299 U. S. 24, 27.
- 4. The act of the Circuit Court of Appeals in disapproving the plan is of important public interest and presents a fundamental question of law involving numerous plans of reorganization of solvent corporations now pending which will remain in an uncertain status unless and until this Court exercises its power of supervision and hears and determines this question.
- 5. The act of the Circuit Court of Appeals in disapproving the plan, if permitted to stand, effectually destroys the possibility of any reorganization under Section 77B even in solvent corporations unless it conclusively appears from the record that creditors have been taken care of in full before stockholders are permitted to participate. This effectually destroys the purpose of the adoption of Section 77B.

Wherefore, your petitioners respectfully pray that this petition be granted.

Dated: September, 1940.

PAUL R. WATKINS,
DANA LATHAM,
Attorneys for Petitioners,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

In the Matter of
CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,
Debaor.

UNION ROCK COMPANY, a corporation

Subsidiary.

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,
Subsidiary

CONSOLIDATED ROCK PRODUCTS CO., a corporation, and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

E. BLOIS dù BOIS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions Below.

The opinion of the District Court was filed September 8, 1938 and is not yet reported but appears in the transcript at page 231. The first opinion of the Circuit Court of Appeals affirming the trial court was filed November 4, 1939 and reported in 107 Fed. (2d) 96, Advance Sheets. The second opinion of the Circuit Court of Appeals reversing its earlier opinion was filed June 19, 1940 and is not yet recorded but appears in the transcript at page 365. The order denying petitioner's petition for rehearing was entered on the 5th day of August, 1940.

Jurisdiction.

The final judgment of the Circuit Court of Appeals was filed on June 19, 1940; a petition for rehearing was filed in the Circuit Court on July 19, 1940 and denied on August 5, 1940. This petition for writ is filed within three months after the filing of both the final opinion and the order denying the rehearing. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

- (1) Does the rule of "fair and equitable" Plans of Reorganization established in Case v. Los Angeles Lumber Products Co., Limited, 308 U. S. 106, require or permit the Circuit Court of Appeals to find that a plan is unfair and inequitable as a matter of law where the debtor is found solvent; where the stockholders are found to have an equity, and where they are permitted to participate because of that equity and because of a compromise of a bona fide dispute.
- (2) Can the Circuit Court of Appeals overrule the findings of fact of the trial court and thereby usurp its functions where a corporation is found solvent, where stockholders have been found to have an equity, where there was found to be a compromise of a bona fide dispute and where the record shows that the trial court acted on an informed and independent judgment.
- (3) May a corporation being reorganized under Section 77B, 48 Stat. 912, 11 U.S.C.A. §207, of the Bankruptcy Act and having subsidiaries in the same proceeding, merge the various properties of all the companies into one company, substituting for separate bond issues on the separate company's properties, one bond issue on all the properties.

Statutes Involved.

The statute here involved is Section 77B of the Bankruptcy Act, 48 Stat. 912, 11 U. S. C. A. §207.

Statement of Case.

The essential facts of the case herein are stated in the accompanying Petition for Writ of Certiorari and in the interest of brevity only the summary thereof is here repeated. It is as follows:

- 1. Union and Consumers with outstanding bond issues at the time their capital stock was acquired by Consolidated. Reliance had no bonded debt.
- 2. Consolidated with no bonded debt at any time, its financial structure consisting of preferred and common stock only.
- 3. No assumption by Consolidated of the bonded indebtedness of Union or Consumers.
- 4. The only possible liability by Consolidated to Union or Consumers—not the bondholders—arising out of an operating agreement.
- (a) Said operating agreement providing that it is for the mutual benefit of the parties to it, i. e.,
 Consolidated, Union, Consumers and Reliance, respectively and not for the benefit of any third party:
 - (b) The operating agreement modified by an agreement of February 19, 1933 providing for
 - I. A method of determining depreciation on a fair basis rather than book value at the time of acquisition, and
 - II. A method of liquidating any sum which might be due thereunder.
- 5. A plan of reorganization evolved after several years of bitter bickering and threats of litigation.

- 6. Requisite consents filed in the proceeding by all interested parties including the bondholders of Union and Consumers.
- 7. Extended hearings before a special master on the plan; extended hearings in the trial court on the special master's report recommending confirmation and then the confirmation.
- 8. An appeal by one objector who acquired his bonds at an average cost of fifteen cents on the dollar after default and just before and after the 77B proceedings.
- 9. The Circuit Court of Appeals affirming the trial court.
- 10. The Circuit Court of Appeals reversing itself and the trial court as a result of the case of Case v. Los Angeles Lumber Products Co. (supra).
- 11. The basis for the Circuit Court of Appeals reversal of itself and the trial court being
 - (a) The plan is not fair and equitable as a matter of law based on the authority of Case v. Los Angeles Lumber Products Co. (supra) even though the stockholders are found to have an equity and even though there was a compromise of a bona fide dispute.
 - (b) The plan cannot be confirmed because it provides for a blanket mortgage to cover all the properties of all the companies in exchange for the bonds against the properties of the two separate companies.

Specification of Error.

- 1. The Circuit Court of Appeals erred in finding that the plan here involved is unfair and inequitable as a matter of law because of the rule established in Case v. Los Angeles Lumber Products Co. (supra), in the face of findings of solvency of the debtor, an equity in the stockholders and the compromise of a bona fide dispute.
- 2. The Circuit Court of Appeals erred in finding that the plan was unfair and inequitable as a matter of law because by virtue of the "full priority" rule established in Case v. Los Angeles Lumber Products Co. (supra), the two original bond indentures could not be merged into one new indenture covering all the properties of all the companies.
- 3. The Circuit Court of Appeals erred in finding the
 plan was unfair and inequitable upon the findings before the court because by so doing it usurped the functions of the trial court.

Arguments and Authorities in Support of Petition.

We intend to base our argument, in the main, on the applicability of Case v. Los Angeles Lumber Products Co., Limited (308 U. S. 106). (Because of frequent reference to this case we shall refer to it as the "Lumber Company" case.) We do this because the Circuit Court of Appeals affirmed the plan prior to that decision and reversed itself afterwards solely on the basis of that decision.

With all due respect for the Circuit Court we must say that, in our opinion, it did not have the facts of our case clearly in mind. That court's final decision, as well as its earlier one affirming the plan, plainly shows this. In this connection we also direct this Court's attention to the fact that on petition joined in by all parties the Circuit Court's final opinion was modified to eliminate obvious fact errors therein. [R. 382.] It is also important that the fact distinction between the two cases clearly appear because our case has been reversed on the authority of the Lumber Company case as a matter of law. Therefore, let us first set out the essential facts in both cases.

Los Angeles Lumber Products Co.*

- I. Securities affected by the plan:
 - (a) \$3,800,000 principal and interest first m gage bonds.
 - (b) 57,000 shares of Class A Common Stock
 - (c) 5,000 shares of Class B Common Stock.

II. Value of enterprise and solvency:

- (a) Value of all properties of debtor \$830, par value of bonded debt, \$3,800,000. (court finds that liquidation at full g concern value will pay the bondholders 25% of their claim.) (Decision pages 119.)
- (b) The debtor is found to be insolvent but the equity and in the bankruptcy so (This court characterizes it as "hopeled insolvent.") (Decision page 124.)
- III. Justification for the 23% participation of comstock.
 - (a) A contract between the interested pa antedating the 77b proceedings and defer foreclosure provided for the plan of reor ization.
 - (b) Avoidance of expense and damage of closure.

^{*}These facts and figures are taken from this Court's de in Case v. Los Angeles Lumber Products Co. (supra.)

consolidated Rock Products and Subsidiaries*

I. Securities affected by the plan:

Consolidated	Union	Consumers
85,000 shs. pfd. stock 87,000 shs. com. stock (no creditors)	Common Stock (No. of shares immaterial) Bonds—1,970,000 (No other creditors)	shares immaterial) Bonds—1,200,000

II. Value of enterprise and solvency:

Consolidated

ssl

a) Value— \$850,000 exclusive of good will and trade name. [R. 281-2.]	\$2,200,000	\$1,150,000
b) Bonded Debt— No honded debt	\$2,330,000 (Principal and accrued interest)	\$1,390,000 (Principal and accrued interest)

- c) Solvency
 Union and Consumers insolvent; Consolidated enterprise solvent.
 [R. 245.]
- III. Justification of participation by preferred stock-holders of Consolidated:
 - (a) Even assuming that the bondholders can reach assets of Consolidated the enterprise is solvent by \$480,000 (summary above).
 - (b) If the bondholders cannot reach the assets of Consolidated its preferred stockholders contributed \$850,000.00 plus good will and trade name valued at \$500,000.00 [R. 281-2.]

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^{*}Unless otherwise designated these figures are from the Circuit ours's Opinion dated November 4, 1939.

Los Angeles Lumber Products Co.* (cont'd).

(c) Maintenance of a going concern.

(d) Stockholders had financial standing and in middle fluence beneficial to corporation.

IV. Financial structure under the plan:

- (a) 640,000 shares of \$1.00 par value stock (to the bondholders).
- (b) 188,000 shares of \$1.00 par value common stock (to the Class A stockholders without subscription or assessment).

dated Rock Products and Subsidiaries* (cont'd).

- (c) In order to reach Consolidated's assets each bondholder group must foreclose its lien, establish a deficiency, if any, then succeed in a favorable construction of the operating agreement and the voiding of the modification of the operating agreement.
- (d) Consolidated's preferred stockholders contributed more than \$7,000,000 to the enterprise, acquired preferred stock subject to no prior lien and should not, under the circumstances, be entirely eliminated.

Financial structure under the plan:

- (a) All the assets of all the companies in one new company.
- (b) \$1,507,000 par value new bonds (this represents one-half of present bonds).
- (c) \$1,507,000 par value preferred stock (30,140 shares at \$50 per share). (This represents one-half of the present bonds.)
- (d) 285,000 shares of common stock (\$2.00 par value). (To present preferred stockholders of Consolidated.)
- (e) Additional shares of common stock to be converted through warrants.

s otherwise designated these figures are from the Circuit

^{*}These facts and figures are taken from this Court's decin Case v. Los Angeles Lumber Products Co. (supra.)

Los Angeles Lumber. Products Co.* (cont'd).

- V. Effect on securities affected by the plan:
 - (a) Bonds—converted into preferred stocking a par value of \$640,000 (roughly of the par value of the cancelled bond interest thereon).

(b) Stock—Class B stock eliminated (this sented old interest on bonds). Class A obtains 23% of the assets and voting

^{*}These facts and figures are taken from this Court's design Case v/Los Angeles Lumber Products Co. (supra.)

ted Rock Products and Subsidiaries* (cont'd).

fect on securities affected by the plan:

) Bonds-

- 1. Full principal converted into one-half bonds and one-half preferred stock against all assets of all companies.
- 2. Cancels accrued interest in the amount of \$625,000.00.
- 3. Changes interest rate from 6% to 5% and makes it cumulative on the new bonds and non-cumulative on new preferred stock.
 - 4. Eases default provisions but gives bondholders management control on default.
 - 5. Provides for common stock warrants.
-) Stock of Union and Consumers-eliminated.
-) Common stock of Consolidated—eliminated except for warrant rights.
-) Preferred stockholders of Consolidated-
 - 1. Surrenders for cancellation \$166,000 par value of bonds of Union and Consumers.
 - 2. Obtains common stock of new company share for share.
 - 3. Becomes subject to prior lien of new bonds and prior claim of new preferred stock.

otherwise designated these figures are from the Circuit nion dated November 4, 1939.

A comparison of the facts in the two cases makes it obvious that the Lumber Company case cannot be used as a basis for reversing this case as a matter of law. There the court was dealing with but one company in which the stockholders acquired their stock subject to the lien of the mortgage indenture; with a company which was "hopelessly insolvent" having liabilities four times its assets: and with a plan which permitted those stockholders to participate without contribution to the extent of 23% of the value of the enterprise. Here we have three companies; the parent, Consolidated, free of any liens; the subsidiaries insolvent, but the parent and the enterprise as a whole, solvent [R. 245]; original purchase by the preferred stockholders of their stock free and clear of any lien; grave question as to whether the parent has any liability to its subsidiaries on which the bondholders may realize; a full preservation of the principal of the bonds; a full priority of the bondholders interest over preferred stockholders of Consolidated even though the bonds are not a lien against that company's properties.

The Effect of the Los Angeles Lumber Products Company Decision.

The opening statement in the Lumber Company decision precludes the Circuit Court of Appeals from reversing its decision and the trial court's in this case as a matter of law. That statement is:

"These cases (the interlocutory order and the final order) present the question of the conditions under which stockholders may participate in a plan of reorganization under §77B—where the debtor corporation is <u>insolvent</u> both in the equity and in the bankruptcy sense." (Pages 108-9. Underscoring and portion in parenthesis ours.)

In addition thereto and with reference to the inapplicability of the Lumber Company decision in the light of the trial court's findings we find the following statements therein:

"The District Court found that the debtor was insolvent both in the equity sense and in the bank-ruptcy sense." (Page 112.)

"We think that as a matter of law the plan was not fair and equitable. At the outset it should be stated that where the plan is not fair and equitable as a matter of law it cannot be approved by the court." (Page 114.)

"We come then to the legal question of whether the plan here in issue is fair and equitable within the meaning of that phrase as used in §77B. We do not believe it for the following reasons. Here the court made a finding that the debtor is insolvent not only in the equity sense but also in the bankruptcy sense. Admittedly there are assets not in excess of \$900,000 while the claims of the bondholders for principal and interest are approximately \$3,800,000. Hence even if all the assets were turned over to the bondholders they would realize less than 25% on their claims. Yet in spite of this fact they will be required, under the plan, to surrender to the stockholders 23% of the value of the enterprise." (Page 119. Underscoring ours.)

Throughout this entire decision repeated reference is made to other decisions on the rule in such cases. In every instance these decisions involve *insolvent* corporations. None of them involves a solvent corporation and none of them involves an intercorporate relationship in any way analogous to that found in the case at bar.

There are numerous statements in the Lumber Company decision which are definite authority for the approval of a plan of the character here involved. They seem to us to be sufficiently definite on such matters to deprive the Circuit Court of Appeals of the right to reverse the trial court on the record in this case. And we must bear in mind that the Lumber Company case and all cases cited thereunder deal with insolvent corporations. We quote the pertinent portions:

1. ". the function and the duty imposed by the Congress on the District Courts in §77B . are no less here than they are in equity receivership reorganizations where this court said 'every important determination by the court in receivership proceedings calls for an informed and independent judgment.' National Surety Co. v. Coriell, 289 U. S. 426, etc." (Page 115.)

The District Court surely exercised informed, independent judgment in the case at bar. Three groups, each adverse to the other (Union bondholders committee, Consumer bondholders committee, and Consolidated), negotiated for years before a plan was evolved which met their approval and subsequently that of the interested parties. The District Court had had this matter under its wing for two years before the plan was presented and well knew the debtors' problems. That court appointed a Special Master who spent days on end hearing testimony and studying the entire problem. That court heard extended arguments on the Special Master's report and after taking the matter under submission for several weeks approved the plan. Surely no one can say that the District Court didn't exercise informed, independent judgment!

2. "And this practical aspect of the problem was further amplified in Kansas City Terminal Railway Co. v. Central Union Trust Co., supra, by the statement that 'when necessary, they (creditors) may be protected through other arrangements, which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances, to avail himself of this right."

and it also recognized the necessity at times of permitting the inclusion of stockholders on payment of contributions even though the debtor company was insolvent." (Page 117. Underscoring ours.)

In the case at bar, we are dealing with a solvent debtor (Consolidated [R. 245]); we are dealing with a corporation whose preferred stockholders purchased their stock subject to no liens; we are dealing with a compromise of a claim by bondholders of subsidiaries to the assets of a parent, under an agreement between the parent and the subsidiaries which provides that it is not made for the benefit of any third parties. We are dealing with a case in which the bondholders, even though they have no lien—only a seriously disputed claim—against the assets of Consolidated are given the prior position against all the property of the subsidiaries and Consolidated.

3. "It is, of course, clear that there are ci cumstances under which the stockholders may participate in a plan of reorganization of an insolvent debtor . . .

"In view of these considerations we believe that to accord 'the creditor his full right of priority against the corporate assets' where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth reasonably

equivalent in view of all the circumstances to the participation of the stockholder. The alleged consideration furnished by the stockholders in this case falls far short of meeting those requirements." (Pages 121-2. Underscoring ours.)

As we have stated repeatedly, the debtor here, Consolidated, is not insolvent. It has no liens. Its only possible liability to bondholders is indirect and determinable only by establishing a deficiency against the subsidiaries and then litigating the operating agreement with Consolidated Despite this, in the plan now before this Court, the bondholders are given full priority against all the assets including those of Consolidated.

4. "Of course, this is not to intimate that compromise of claims is not allowable in §77B. There frequently will be situations involving conflicting claims to specific assets which may, in the discretion of the court, be more wisely settled by compromise rather than by litigation . . . In sanctioning such settlements the court is not bowing to nuisance claims; it is administering the proceedings in an economical and practical manner." (Page 130. Underscoring ours.)

It is interesting to note this court's footnote reference to In the Matter of Detroit International Bridge Co., Debtor, No. 24131, U. S. D. C. E. D. Mich. This plan, approved by the Securities & Exchange Commission has since been approved by the District Court. (30 F. Supp. 127 [1939].) It deals with an insolvent corporation in which the stockholders participated because of a compromise of a disputed claim.

It would be difficult to obtain a case whose facts more clearly fit it into the rule here announced than the case

at bar. And this rule governs insolvent corporations. the case at bar we have these significant factors: the debtor. Consolidated, solvent; the debtor with no liens against its properties; the preferred stockholders of debtor acquiring their shares for some \$7,000,000 when there were no claims 'ahead of them; violent disputes over a period of years not only between the bondholders and the preferred stockholders of Consolidated but between the two bondholder groups over the property covered by their respective liens; repeated threats of litigation over these matters; the necessity of legal determination of rights as between the bondholders; the necessity of foreclosing the liens and establishing a deficiency; protracted negotiations and giving and taking until a solution was arrived at: consent of all parties to that solution and then its frustration by one discontented bondholder who acquired his bonds after default, and just before and after the commencement of the proceedings, at fifteen cents on the dollar. [R. 243-244 and 107 Fed. (2d) 96, 98-9, Advance Sheets.] If any lack of bona fides can be asserted with respect to anyone; if there is any one trying to establish a nuisance value, it must be objector du Bois, and certainly not petitioner herein.

All of the foregoing pronouncements of this court when dealing with insolvent corporations would make it clear that this plan should be confirmed under the rules there established. Any other rule governing §77B reorganizations would effectually destroy its usefulness. It was adopted to prevent the dismemberment of a going concern when a large majority of the interested parties agreed to compromise their differences. It was adopted to prevent frustration of such compromises by precisely the type of minority interest as that of respondent herein.

The Right of Union Bondholders to Participate in Consumers Properties and the Right of Consumers Bondholders to Participate in Union's Properties.

This case should not be permitted to stand as it holds that there can be no merger of divisional mortgages. Little need be said in this court on this point. This point was not even raised before the Circuit Court of Appeals. Even though it had been, there is ample authority for that part of the plan. Even though this question was not before the court in the Lumber Company case this court there mentioned one of the questions upon which conditions in insolvent corporations often arose was over divisional mortgages. It stated:

"Close questions of interpretations of after-acquired property clauses in mortgages, preferences in stock certificates, divisional mortgages and the like will give rise to honest doubts as to which security holders have first claim to certain assets. Settlement of such conflicting claims to the *res* in the possession of the court is a normal part of the process of reorganization." (Page 130.)

In the case at bar the question arises because, as a part of the compromise resulting in the plan, all properties of all the companies, including the unencumbered property of Consolidated, are to be conveyed to one corporation; the separate bond issues against the separate properties of the two subsidiaries are to be extinguished and new bonds in lieu thereof are to be issued against

all the assets by the new corporation. This the court condemns on the basis of the Lumber Company decision.

We quote from the opinion of the Circuit Court:

"It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumer's bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, vet the Consumer's bondholders are deprived of their right to full priority against Consumer's assets since Union's bondholders and debtor's preferred stockholders are given an interest in Consumer's property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Company, supra." [R. 377. Underscoring ours.]

This question of divisional mortgages arises most frequently in railroad reorganizations. It was before this court with certiorari denied in the case of Jameson v. Guaranty Trust Co. of New York, 20 Fed. (2d) 808 (C. C. A. 7th, 1927), certiorari denied 275 U. S. 569 (1927). In addition thereto two such plans have been approved by the Interstate Commerce Commission since the Lumber Company decision. These arose under §77

of the Bankruptcy Act (11 U.S. C. Para. 205), in Missouri Pacific Reorganizations, 239 I. C. C. 7 (Jan. 10, 1940), and Chicago & Northwestern Reorganization, 236 I. C. C. 575 (Dec. 12, 1939).

As is shown by the above quotation from the Circuit Court of Appeals decision, that court gave as its basis for condemnation of a merger of divisional liens the Lumber Company decision. It should not stand. In the case at bar no such point was raised by any party and all parties before the court took the position that continued operation of the entire enterprise as one unit was the most feasible solution [R. 244].

The writ here requested should issue for the following reasons:

- 1. The Circuit Court of Appeals has bottomed its decision on the Lumber Company case and wholly misconstrued the intended application of the principle therein established. The Lumber Company decision is the sole basis for the reversal as this same court had approved the plan just prior to that decision.
 - 2. The Lumber Company decision, properly applicable as to insolvent corporations, has been applied as a matter of law to a solvent corporation where the facts and circumstances are in no way comparable.
 - 3. The Circuit Court of Appeals decision should not be allowed to stand because it vitally affects numerous pending plans of reorganization which must of necessity be thrown into hopeless uncertainty. Particularly is this true where divisional mortgages are involved; where the

working out of stockholders equity in solvent corporations is a part of a plan and where the interested parties to any dispute are attempting to settle their differences and preserve a going concern.

4. The Circuit Court of Appeals decision usurps the functions of the trial court in that while it states that the case is reversed as a matter of law, actually it is reversing the trial court—and itself—on questions of fact. This it cannot do. In the case of *In re 620 Church Street Building Corporation*, et al., 299 U. S. 24, 27, this court stated:

"And as the Court of Appeals, if the appeal had been allowed, could have revised the ruling of the Court below only in the matters of law, it necessarily follows—and was conceded at the bar—that petitioners are bound by the findings of fact."

The trial court found the enterprise solvent [R. 245] and it found that there was a *bona fide* dispute which had been settled in good faith [R. 244, 260].

5. The Circuit Court of Appeals decision should not be permitted to stand for equitable reasons. That court, in its first opinion, critically, but aptly, referred to the lone objector here by quoting from J. S. Farlee & Co., Inc. v. Springfield-South Main Realty Co., 1 Cir., 86 Fed. (2d) 931, 936, among other things, the following:

"If the purpose actuating it in making these purchases is to be judged by its conduct since they were made, it would seem to have been to obstruct and defeat the plan of reorganization unless its wishes were met, irrespective of the wishes of all the other bondholders." (107 Fed. (2d) 96, 104, Advance Sheets.)

While from a strict legal standpoint this objector's position in court must be recognized, we believe and urge that this plan should not be upset for his benefit unless it is patently and seriously defective. Those who have paid full price for their bonds and have lived with this picture for years realized the serious problems confronting all parties when they sat down to their apparently hopeless task of working out a plan which could obtain the requisite approval. Those people were and are aware of the endless negotiations, the interminable hearings before the Special Master and the trial court and the affirming of the plan by the trial court and then by the Circuit Court of Appeals. They must feel that their interests have now been subordinated to the will of a stranger to them and to this company's problems.

We respectfully pray that this Honorable Court take jurisdiction in the premises herein.

Dated: September, 1940.

PAUL R. WATKINS,

DANA LATHAM,

Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1940 No. 400.

In the Matter of CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation, Debtor,

UNION ROCK COMPANY, a corporation,

Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation, Subsidiary.

CONSOLIDATED ROCK PRODUCTS CO., a corporation, and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

E. BLOIS DU BOIS,

·Respondent.

BRIEF FOR THE PETITIONERS.

PAUL R. WATKINS, O. DANA LATHAM,

1112 Title Guarantee Building, Los Angeles,

Attorneys for Petitioners.

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Supreme Court of the United States

October Term, 1940 No. 400.

In the Matter of CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,

UNION ROCK COMPANY, a corporation,

Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation, Subsidiary.

CONSOLIDATED ROCK PRODUCTS CO., a corporation, and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

E. BLOIS DU BOIS.

Respondent

BRIEF FOR THE PETITIONERS.

Opinions Below.

The opinion of the District Court was filed September 8, 1938 and is not yet reported but appears in the transcript at page 231. The first opinion of the Circuit Court of Appeals affirming the trial court was filed November 4, 1939 and reported in 107 Fed. (2d) 96, Advance Sheets. The second opinion of the Circuit Court of Appeals reversing its earlier opinion was filed June 19, 1940 and is reported at 114 Fed. (2d) 102, Advance Sheets. The order denying petitioner's petition for rehearing was entered on the 5th day of August, 1940.

The final judgment of the Circuit Court of Appeals was filed on June 19, 1940; a petition for rehearing was filed in the Circuit Court on July 19, 1940 and denied on August 5, 1940. A petition for a writ of certiorari was filed September 6, 1940 and was granted October 28, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statute Involved.

The statute here involved is Section 77B of the Bank-ruptcy Act, 48 Stat. 912 (1934), 11 U.S.C.A. §207 (1937).

Statement.

Throughout this brief we may, for brevity, refer to certain names as follows: Consolidated Rock Products Co., a Delaware corporation, as Consolidated; Consumers Rock & Gravel Company, Inc., a Delaware corporation, as Consumers; Union Rock Company, a Delaware corporation, as Union; the case of Case v. Los Angeles Lumber Products Co., Limited, 308 U. S. 106 (1939), as the Lumber Company decision; and the Securities & Exchange Commission as the S.E.C.

The facts in this case are set forth at length in our Petition for a Writ of Certiorari, pages 3 to 9, inclusive.

They are also set forth in the opinions of the court below. Summarized, they are as follows:

- 1. Union and Consumers are wholly owned subsidiaries of Consolidated and are being reorganized with it as subsidiaries. [R. 219.]
- 2. Union and Consumers had outstanding bond issues at the time their capital stock was acquired by Consolidated. Reliance had no bonded debt. [R. 235.]
- 3. Consolidated has had no bonded debt at any time, its financial structure consisting of preferred and common stock only. [R. 234.]
- 4. Consolidated has never assumed the bonded indebtedness of Union or Consumers. [R. 235.]
- 5. The only possible liability of Consolidated to Union or Consumers—not the bondholders—arises out of an operating agreement entered into in 1929.
 - (a) Said operating agreement provides that it is for the mutual benefit of the parties to it, i.e., Consolidated, Union, Consumers and Reliance, respectively and not for the benefit of any third party. [R. 237.]
 - (b) The operating agreement was modified by an agreement of February 19, 1933, providing for
 - I. A method of determining depreciation on a fair basis rather than book value at the time of acquisition, and
 - II. A method of liquidating any sum which might be due thereunder. [R. 179, 237.]
- 6. Pursuant to the operating agreement, Consolidated has operated all the properties as a unit since

April 1, 1929. From that date to the date of filing of the petition for reorganization under 77B, Consolidated paid the interest and sinking fund requirements on Union and Consumers bonds as follows:

	Interest paid	Sinking fund payments	Total
Union bonds	\$603,240.002	\$443,500,004	\$1,046,740.00
Consumers bonds	412,305.003	299,500.605	711,805.00
Total	\$1,015,545.00	\$743,000.00	\$1,758,545.00
. /			

7. On May 24, 1935, Consolidated, Consumers and Union filed petitions for reorganization under 77B. [R. 26.]

- 8. After several years of bitter bickering and threats of litigation, the interested parties agreed upon a plan of reorganization providing essentially for the following:
 - (a) A new corporation to which all the assets of Consolidated and its subsideries will be transferred.
 - (b) The bondholders of Union and Consumers will surrender their bonds, cancel accrued interest to April 1, 1937, and receive in lieu of each such bond a new bond with 5% cumulative interest in one-half the principal amount of the original bond; new preferred stock of a par and preference value equal to one-half of the principal amount of the original bond and common stock purchase warrants.

¹R. 185-188.

²default Mar. 1, 1934.

adefault July 1, 1934.

default Sept. 1, 1933.

⁸default July 1, 1934,

- (c) The new bonds and the new preferred stock will be issued by the new corporation and will constitute a lien and a preference respectively against all of the assets of the new corporation.
- (d) The old preferred stockholders of Consolidated will receive one share of common stock of the new corporation for each share of old preferred stock.
- (e) The old common stockholders of Consolidated will receive stock purchase warrants entitling them for a limited time to purchase for cash one share of new common stock for each five shares of old common owned.
- (f) Consolidated will surrender for cancellation \$166,000. par value of Union and Consumers' bonds and will transfer all of its assets to the new corporation to become subject to the aforesaid lien and preference of the Union and Consumers bondholders.
- (g) The new corporation shall have nine directors, of whom the present bondholders shall elect four, except that when a default exists respecting bond interest, the present bondholders shall elect six directors.
- (h) There are no other interested parties dealt with, current creditors having been taken care of currently. [R. 26-31, 49-50.]
- 9. Requisite consents were filed in the proceeding by all interested parties including the bondholders of Union and Consumers. [R. 260.]
- 10. Extended hearings on the plan were held before a special master; extended hearings were held

before the District Court on the special master's report recommending confirmation; and then the plan was finally confirmed.

- all. An appeal was taken by one objector who acquired his bonds after default and just before and after the commencement of the 77B proceedings at an average cost of fifteen cents on the dollar. [R. 156-7.]
- 12. The Circuit Court of Appeals affirmed the decree of the District Court.
- 13. Subsequently, the Circuit Court of Appeals reversed itself and the District Court as a result of the Lumber Company case.
- 14. The basis for the Circuit Court of Appeals' reversal of itself and of the trial court was:
 - a. Before it can be determined whether or not from the standpoint of preferred stockholder participation the plan is fair and equitable within the standard set up by the Lumber Company case, there must first be:
 - 1. A settlement voluntarily or by litigation of the claim of Consumers and Union against Consolidated arising out of the operating agreement, and
 - A precise finding of the value of the properties.
 - The plan is not fair and equitable within the test set up by the Lumber Company case because the preferred stockholders are given an interest in the separate properties of Consumers and Union.
 - The plan is not fair and equitable within the test set up by the Lumber Company case because the bondholders of Union are given an interest in the separate property of Consumers and the bondholders of Consumers are given an interest in the separate property of Union.

Specification of Errors.

- I. THE CIRCUIT COURT ERRED IN RULING THAT THERE
 MUST BE A SETTLEMENT OF THE DISPUTED CLAIM 7
 ARISING FROM THE OPERATING AGREEMENT BEFORE THIS PLAN CAN BE DETERMINED TO BE FAIR
 AND EQUITABLE FROM A STANDPOINT OF PREFERRED
 STOCKHOLDER PARTICIPATION.
- I. THE CIRCUIT COURT ERRED IN RULING THAT THERE
 MUST BE A PRECISE FINDING OF VALUE BEFORE THIS
 PLAN CAN BE DETERMINED TO BE FAIR AND EQUITABLE FROM THE STANDPOINT OF PREFERRED STOCKHOLDER PARTICIPATION.
- I. THE CIRCUIT COURT ERRED IN FINDING THE PLAN NOT FAIR AND EQUITABLE BECAUSE THE PREFERRED STOCKHOLDERS ARE THEREBY GIVEN AN INTEREST IN THE SEPARATE PROPERTIES OF CONSUMERS AND UNION.
 - TRE CIRCUIT COURT ERRED IN FINDING THE PLAN NOT FAIR AND EQUITABLE BECAUSE THE BONDHOLDERS OF UNION ARE THEREBY GIVEN AN INTEREST IN THE SEPARATE PROPERTY OF CONSUMERS AND THE BONDHOLDERS OF CONSUMERS ARE THEREBY GIVEN AN INTEREST IN THE SEPARATE PROPERTY OF UNION.
- 7. THE CIRCUIT COURT ERRED IN FAILING TO FIND THE PLAN FAIR AND EQUITABLE IN ALL RESPECTS.

ARGUMENT

- I. A SETTLEMENT BY AGREEMENT OR OTHERWISE IS NOT NECESSARY IN ORDER THAT THIS PLAN MAY BE DETERMINED TO BE FAIR AND EQUITABLE FROM THE STANDPOINT OF PREFERRED STOCKHOLDER PARTICIPATION.
 - (a) The Circuit Court erroneously applied the Lumber Company case in ruling as a matter of law that the plan cannot be determined to be fair and equitable until there is a settlement of the disputed claim
 - (b) Even assuming that the propriety of the compromise in the present case is a question of fact, the Circuit Court erred in reversing the determination of the District Court that it was proper for the parties to compromise the disputed claim and embody the compromise in the reorganization plan.
- II. A MORE PRECISE FINDING OF VALUE IS NOT NECESSARY
 IN ORDER THAT THIS PLAN MAY BE DETERMINED TO
 BE FAIR AND EQUITABLE FROM THE STANDPOINT OF
 PREFERRED STOCKHOLDER PARTICIPATION.
 - (a) The Circuit Court erroneously applied the Lumber Company case in ruling as a matter of law that the plan cannot be determined to be fair and equitable without more precise findings of value.
 - (b) Even assuming that the preciseness of findings of value is a question of fact, the Circuit Court erred in reversing the determination of the District Court that the present findings of value are sufficient.

- III. THE PLAN IS FAIR AND EQUITABLE IN GIVING THE PREFERRED STOCKHOLDERS AN INTEREST IN ALL ASSETS OF THE NEW CORPORATION INCLUDING THE ASSETS OF UNION AND CONSUMERS.
- IV. THE PLAN IS FAIR AND EQUITABLE IN GIVING THE BONDHOLDERS OF UNION AND CONSUMERS AN INTEREST IN THE PROPERTIES OF CONSUMERS AND UNION, RESPECTIVELY.
 - V. THE PLAN IS FAIR AND EQUITABLE.

We stated in our brief on petition for certiorari and repeat here that the lower court did not analyze the factual situation in the case at bar. In that brief, we sought to analyze the facts and compare them with those in the Lumber Company decision. Because of the importance of the facts in this case, we have for the convenience of the Court attached that fact comparison as Appendix No. I.

- A Settlement by Agreement or Otherwise Is Not Necessary in Order That This Plan May Be Determined to Be Fair and Equitable From the Standpoint of Preferred Stockholder Participation.
- (a) THE CIRCUIT COURT ERRONEOUSLY APPLIED THE LUMBER COMPANY CASE IN RULING AS A MATTER OF LAW THAT THE PLAN CANNOT BE DETERMINED TO BE FAIR AND EQUITABLE UNTIL THERE IS A SETTLEMENT OF THE DISPUTED CLAIM.

At no place in the Lumber Company decision is there any intimation that compromises of disputed claims are not permissible in a 77B reorganization. Rather, this Court seems to have taken the opposite and only reasonable position that compromises are often not only permissible but desirable. There it said, after pointing out that a groundless threat of litigation did not justify giving an interest to stockholders:

"Of course, this is not to intimate that compromise of claims is not allowable under section 77B. There frequently will be situations involving conflicting claims to specific assets which may, in the discretion of the court, be more wisely settled by compromise rather than by litigation. In sanctioning such settlements the court is not bowing to nuisance claims, it is administering the proceedings in an economical and practical manner." (p. 130.)

This court then cited with approval In the Matter of Deiroit International Bridge Co. Debtor, Corporate Reorganization Release No. 9, 30 F. Supp. 127 (U.S.D.C. E.D. Mich., 1939). There the claims of the senior creditors far exceeded the value of the properties. Yet the

plan gave to the junior creditors 7.7% of the equity of the new corporation. One of the reasons given for their participation was:

"(3) By reason of the fact that the Michigan property taxes were unpaid during the pendency of the tax controversy, a substantial amount of cash was on hand when the petition to reorganize was filed on May 26, 1938. The representatives of the debenture holders asserted a claim to a proportionate share of this cash. This claim, if valid, would mean that the debenture holders would be entitled to be paid perhaps as much as \$220,000 in cash. The representatives of the boudholders stated that, without conceding the validity of the claim, they deemed it sufficient to warrant adjustment by way of settlement."

The S. E. C. in its report approved the plan as fair and equitable from the standpoint of the participation by the junior creditors for the reason above set forth. It did not even suggest that the judgment of the bondholders, that such a compromise was desirable, should be inquired into, but rather it abided by their judgment without even discussing the merits of the claim of the junior creditors.

The purpose of 77B and its successor, Chapter X.² is to present a procedure for the expeditious reorganization of corporations in a manner that will preserve to the security-holders the value of the enterprise as a going enterprise. In such reorganizations there are always a number of conflicting interests making adverse claims the settlement of

¹In the Matter of Detroit International Bridge Company, S.E.C. Corporate Reorganization Release No. 9, p. 6 (Mar. 24, 1939).

²⁵² Stat. 883 et seq. (1938), 11 U.S.C.A. §502 et seq. (1939).

which would be both expensive and time-consuming. To effectuate the purpose and intent of the statute, compromises of reasonably disputed claims must be allowed.

Prior to the decision in the Lumber Company case, the Circuit Court here had affirmed the decree of the District Court approving the present plan. It necessarily must have agreed with the District Court that this same plan, embodying the same compromise, was fair and equitable. Then following the Lumber Company decision, the Circuit Court reversed its prior decision in part upon the ruling that the compromise cannot be sanctioned. This, it did without any consideration whatever of the merits of the compromise. It merely ruled that any compromise of this dispute could not be sanctioned. Such a ruling must be a rule of law mistakenly based upon the Lumber Company case, and as such it is clearly wrong and should be reversed.

(b) Even Assuming That the Propriety of the Compromise in the Present Case Is a Question of Fact, the Circuit Court Erred in Reversing the Determination of the District Court That It Was Proper for the Parties to Compromise the Disputed Claim and to Embody the Compromise in the Reorganization Plan.

The dispute here centers around the effectiveness of the agreement of February 1933, modifying the original operating agreement. In 1929 all the corporations entered into the original operating agreement which provided, among the things, that Consolidated should depreciate, deplete and amortize the operating properties according to proper accounting methods, but did not, however, spe-

^{1107.} Fed. (2d) 96, Advance Sheets.

cify the basis for such depreciation, etc.; that upon the termination of the agreement there should be a final accounting and settlement, and that the agreement could be terminated by either Consolidated or the owning companie on 30 days notice. [R. 167-174.] Consolidated then began crediting the owning companies with depreciation, etc., based upon subsidiary book values of about 13.5 million. It was soon thereafter realized that these book values were grossly in excess of actual values, In 1933. all the corporations entered into a second agreement modifying the original agreement of 1929. This 1933 agreement definitely fixed the basis for depreciation, etc., as actual current values, and like the original agreement provided for an accounting and settlement at the termination of the agreement. It further provided for a definite term of 5 years with an option to Consolidated to extend the agreement another 5 years, and it gave Consolidated an option in making the settlement at the termination of the agreement to defer payments due thereunder over a 10 year period, paying 75% of the amount due at the end of the 10th year. [R. 178-181.] Thus, by the terms of the modified operating agreement, Consolidated could extend the agreement to 1943, and could then defer the payment of 75% of any amount due until 1953.

The Record shows that in formulating the plan, the representatives of the bondholders were fully aware of the possibility of rights in the bondholders against the assets of Consolidated arising from the operating agreement. [R. 275-6, 278.] The Record further shows how all the interested parties were very hostile to each other and that they were unwilling to give one bit more than was absolutely necessary. [R. 147.] When the representatives of the bondholders and the preferred stock-

holders finally agreed upon the present plan, the approval of the distribution of the securities therein provided for necessarily involved a compromise of the disputed claim arising out of the operating agreement. The approval by the District Court of the plan and the distribution of securities therein provided for likewise necessarily involved an approval of the compromise. All interested parties except this lone objector have either agreed to the compromise or have acquiesced in its approval. Now at the instance of this lone objector the Circuit Court has ruled that the compromise cannot be sanctioned, but, in effect, that the claim must be settled by litigation before it can be determined whether or not the plan is fair and equitable.

An analysis of the merits of the contentions of the parties will show that the decision of the District Court on this question was the only decision reasonably possible.

The contention of the objecting bondholder is that the agreement of 1933 is void and that Consumers and Union have a present claim against Consolidated based upon the original agreement, which claim may be reached by the bondholders. On the other hand, the preferred stockholders take the position that the agreement of 1933 is neither void nor voidable, that any rights must be determined by the agreement as modified, and that, at most, the rightful claim of Consumers and Union is for an indefinite amount, the payment of which, when determined, Consolidated could properly defer, for the most part, until 1953.

The validity of contracts entered into by the debtor is governed by State law.

See Benedict v. Ratner, 268 U. S. 353, 359, 45 S. Ct. 566, 567 (1925);

- 2 Gerdes on Corporate Reorganization (1st Ed. 1939), Section 883;
- 4 Remington on Bankruptcy (4th Ed. 1935), Section 1406.

Since the operating agreement and the modification thereof were executed and were to be performed in California, the California law governs.

Restatement, Conflict of Law (1934), Section 332(e).

By California law the agreement of 1933 is valid. It is neither void nor voidable, because the contracting corporations had common officers and some common directors.

Buck v. Tuxedo Land Co., 109 Cal. App. 453, 293 Pac. 122 (1930).

(held: that a transaction between two corporations having identical boards of directors cannot be avoided by a minority stockholder without an affirmative showing of fraud or injury. Dictum at p. 461, Pac. 125, that if ratified by a majority of stockholders, the minority stockholder could avoid it only upon proof of fraud. This case very thoroughly discusses the California cases on this question.)

6 California Jurisprudence (1926), Section 449.

While this law relates to a minority stockholder, certainly a creditor stands in no better position.

The agreement of 1933 is neither void nor voidable for fraud. Certainly there is nothing in the record that

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even remotely suggests fraud. As a matter of fact, all of the equities support the modification. It places depreciation definitely on a fair basis instead of the basis of inflated subsidiary book values. There is no other basis upon which it can be contended that the agreement is void or voidable.

Furthermore, those rights which actually exist under the operating agreement are not direct rights of the bondholders. The agreement expressly stated that it was not made for the benefit of third persons. The rights of a mortgagee under a mortgage are governed by state law, just as are questions of the validity of contracts.

See Humphrey v. Tatman, 198 U. S. 91, 25 S. Ct. 567 (1905);

- 2 Gerdes on Corporate Reorganizations (1939), Section 883;
- 4 Remington on Bankruptcy (4th Ed. 1935), Section 1406.

Since the properties are located in California, California law governs.

Restatement, Conflict of Laws (1934), §225, 265.

By California law before the bondholders can assert any right to this claim of their corporations there must be a foreclosure sale and it must then be established by appraisers that the value of the properties subject to the bond indentures is less than the bond principal plus accrued interest.

Calif. Code Civ. Proc. (Deering, 1937), §726. [See Appendix II.]

From all of this, how can it be said that the preferred stockholders are unreasonable in denying the existence of any present liability under the operating agreement. Rather it seems that any unreasonableness lies on the side of the espondent in asserting that a present liability exists. In uch a situation, to require in the interests of the bondcolders and at the instance of this sole objector that there
e time-consuming and expensive litigation of this disoute is wholly beyond reason. Yet, that is precisely what
he Circuit Court has done.

Here the bondholders have a very tenuous claim, the nost that can be said for it being that each side reason-bly disputes the claim of the other. The present plan mbodying a compromise of this claim was promulgated fter years of bitter fighting between the interests involved. All parties agree that it would be most underirable to jeopardize the possibility of ultimate unified peration of the properties. The interested parties, the pecial master and the District Court all, after extended and careful consideration, have concluded that no other ettlement than that embodied in the plan is possible and that litigation will wreck the whole enterprise.

If it was proper to compromise the disputed claim in the International Bridge Reorganization, supra, how can be said in the interests of the bondholders in the present ase that the disputed claim should be litigated. Certainly, my litigation here will be much more expensive and time-onsuming than it would have been there. Here, not only me merits of the case but also the judgment of all of the interested parties point to the single conclusion that the ispute be compromised. Yet, in the face of all this, the ircuit Court, presumably acting in the interests of the condholders but actually at the instance of this lone objector who purchased his bonds at fifteen cents on the collar, has in effect ruled that there must be a litigation of this disputed claim.

We respectfully submit that the ruling of the Circuit ourt was clearly unreasonable and should be reversed.

A More Precise Finding of Value Is Not Necessary in Order That This Plan May Be Determined to Be Fair and Equitable From the Standpoint of Preferred Stockholder Participation.

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(a) THE CIRCUIT COURT ERRONEOUSLY APPLIED THE LUMBER COMPANY CASE IN RULING AS A MATTER OF LAW THAT THE PLAN CANNOT BE DETERMINED TO BE FAIR AND EQUITABLE WITHOUT MORE PRECISE FINDINGS OF VALUE.

There certainly is nothing in the Lumber Company decision that even remotely suggests that in every 77B reorganization there must be a precise finding of value. True enough, the fair and equitable standard there set forth might be considered to require some collateral determination of value, but the proposition that in every 77B reorganization there must be a minute appraisal to ascertain the precise value of the properties involved finds no support whatever in this case.

Prior to the decision of the Lumber Company case, the Circuit Court here had affirmed the decree of the District Court approving the present plan. It necessarily must have agreed with the District Court that this same plan based upon the present findings of value was fair and equitable. Then following the Lumber Company decision, the Circuit Court reversed its prior decision in part upon the ruling that there must be a more precise finding of

¹¹⁰⁷ Fed. (2d) 96, Advance Sheets.

value. This, it did, without any consideration of the oundness of the present findings of value. It merely ruled hat no findings of value, short of those ascertainable by minute and detailed appraisal, will be sufficient. Such a uling must have been a ruling of law mistakenly based upon the Lumber Company case, and as such it is clearly wrong and should be reversed.

b) Even Assuming That the Preciseness of Findings of Value Is a Question of Fact, the Circuit Court Erred in Reversing the Determination of the District Court That the Present Findings of Value Are Sufficient.

The decision of the District Court was reached in the ght of findings of value of the properties which were ased upon the testimony of three independent and very apable witnesses, Gautier, Rogers and Mitchell. [R. 239.] t is striking how close their total valuations are. IR. 81-2, 290, 292.] The Record shows the long experience f these three witnesses in the rock business, and their amiliarity with all of their properties. No one could be ound in Southern California or elsewhere who has the ntimate knowledge of this business in Southern California nd the condition of these properties that each of these nree men has. Mr. Mitchell has been an active officer Union since its organization in 1922. as for many years prior to 1929 an active officer of onsumers. Both men have actively participated in the anagement of Consolidated since its organization in

Union for many years before the organization of Consolidated in 1929, and since that time has been actively connected with a competing rock company. [R. 291-2]. Doubtless the District Court felt that the figures of Gautier, the former head of Consumers, might be high for Consumers' properties and low for Union. The converse was true regarding the figures of Rogers, one of the former heads of Union. Rogers was anything but a friendly witness. He was not called by the petitioners. Mitchell has always been neutral.

The District Court found that an appraisal would take a great deal of time, would be extremely difficult because of the physical commingling of the properties, would be very expensive and, when completed, would be of questionable accuracy. [R. 225.]

The Record shows that the preferred stockholders originally wanted an appraisal, but withdrew their request after considering the expense, delay and questionable value of an appraisal and the correlation of the testimony of Gautier, Rogers and Mitchell. [R. 271-2.] The Union committee at one time considered an appraisal, but later abandoned the idea for the same reasons. [R. 274-5.]

In the face of all this the Circuit Court has, in effect, ruled that there must be an expensive appraisal of all the properties:

Just as a determination by the District Court must be based upon an informed independent judgment, National Surety Co. v. Coriell, 289 U. S. 426, 53 S. Ct. 678 (1933),

so a determination by the Circuit Court must be based upon an informed and independent judgment. The present case is a very complicated case. The difficulties which would be faced in an attempt at an accurate appraisal; the extent to which, in the interests of unified operation the properties have been commingled; the expense required for such an appraisal and the benefit thereof, if any, can be fully appreciated by a court only after extended hearings; in which all interested parties present all sides of the question. We submit that the Circuit Court was not sufficiently informed to warrant its making a ruling on this very complicated question of fact.

Even assuming that the facts before the Circuit Court warranted a determination by it of the expense and time required and the results of an appraisal, it still remains clear: first, that any appraisal will be subjected to the same bickering that has characterized the past proceedings; second, that the properties have been commingled in the interests of unified operation to a point where such an appraisal would be very expensive and would only give rise to a false sense of accuracy; and third, that the question of appraisal does not arise in this case until the foreclosure of the mortgages securing the bond issues and the establishment of a deficiency thereunder. We submit that this ruling of the Circuit Court was, as to the present set of facts, clearly unreasonable and should be reversed.

III.

The Plan Is Fair and Equitable in Giving the Preferred Stockholders an Interest in All Assets of the New Corporation Including the Assets of Union and Consumers.

The Circuit Court has ruled, without regard to the extent of the contribution of assets by the preferred stockholders, that the plan is not fair and equitable because the stockholders thereby receive an interest in properties of Union and Consumers when those properties admittedly are not sufficient to pay bond principal and accrued interest. Where stockholders make no contribution of value to the new corporation, they obviously cannot be given any interest in properties that are insufficient to pay the claims of bondholders. This is the holding of the Lumber Company case. However, where the stockholders contribute assets of value to the new corporation, they must be given an interest in the corporation. This Court said in the Lumber Company case:

"It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. This Court, as we have seen, indicated as much in Northern Pacific Railway Co. v. Boyd, supra, and Kansas City Terminal Ry. Co. v. Central Union Trust Co., supra. Especially in the latter case did this Court stress the necessity, at times, of seeking new money 'essential to the success of the undertaking' from the

old stockholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made."

(p. 121.)

In this case the preferred stockholders are making a contribution of assets to the new corporation and they are entitled to receive in return a participation reasonably equivalent to this contribution. Any participation must necessarily be a participation in all of the assets, including the assets contributed by the bondholders. If it is not fair and equitable to give these preferred stockholders an interest in all the assets of the new corporation by giving them junior securities in the new corporation, neither would it be fair and equitable to give securities in a new corporation to old stockholders of an insolvent corporation who had "made a fresh contribution." Such a proposition, following necessarily from the ruling of the Circuit Court, is obviously contrary to the statement of this Court just quoted. This ruling of the Circuit Court must be reversed.

IV.

The Plan Is Fair and Equitable in Giving the Bondholders of Union and Consumers an Interest in the Properties of Consumers and Union Respectively.

Here the bondholders of Union and the bondholders of Consumers, as well as the preferred stockholders of Consolidated, are each contributing properties to the new corporation. The bondholders of Union give up their prior right to all Union assets and, in return, share with the bondholders of Consumers prior rights to the combined assets of Union, Consumers and Consolidated. The bondholders of Consumers give up their prior right to all Consumers assets and, in return, share with the bondholders of Union prior rights to the combined assets of Union, Consumers and Consolidated. Now, the Circuit Court says that, wholly aside from the fairness of this aspect of the plan, if one bondholder objects it cannot be done.

Notwithstanding that the Circuit Court used the Lumber Company decision as its authority, we submit that that case in no way supports the ruling of the Circuit Court. There this Court was dealing with the right of stockholders of a hopelessly insolvent corporation to participate under the plan of reorganization without contributing anything of value. Neither the holding nor any of the language of that case lends any support to this ruling of the Circuit Court.

Section 77,2 relating to railroad reorganizations, all require that a plan of reorganization, to be acceptable, must be feasible. It is elementary that a feasible plan cannot provide for a complicated capital structure. If the ruling of the Circuit Court is a correct interpretation of the words fair and equitable, it will be practically impossible to work out many reorganizations under 77, 77B and Chapter X. This is best illustrated by rail oad reorganizations where there are frequently many bond issues involved.

Jameson v. Guaranty Trust Co. of New York, 20 Fed. (2d) 808 (C. C. A. 7th, 1927), cert. denied 275 U. S. 569 (1927) (the plan merging two bond issues was approved by the Circuit Court);

In re Chicago & N. W., Ry. Co., 35 F. Supp. 230, 259 (S. C. D. Ill., 1940) (12 separate bond and debenture issues);

In re United Railways and Electric Company, 11

F. Supp. 717 (D. C. Md., 1935) (9 separate bond and debenture issues);

Missouri Pacific Reorganizations, 239 I. C. C. 7 (1940).

The statutory requirement that reorganization plans be feasible was wholly disregarded by the ruling of the Circuit Court, and the ruling should be reversed.

^{.152} Stat. 883 et seq. (1938), 11 U.S.C.A. \$502 et seq. (1939).

²⁴⁷ Stat. 474 et seq., (1933), 11 U.S.C.A. §205 (1937)/

V.

The Plan Is Fair and Equitable.

The pertinent facts as shown by the Record are as follows:

(a) VALUATION TESTIMONY.

	Mitchell		Gautier	Rogers
	[R. 281-2]		[R. 290]	[R. 292]
Union	\$1,975,200		\$1,750,000	\$2,318,000
Consumers	1,267,100		1,436,000	750,000
Reliance	175,000		190,000	200,000
Consolidated	500,000	.0	- 534,000	(Did not testify)
. ¹Total .	\$3,917,300		\$3,910,000	\$3,268,000

(b) PRINCIPAL AND ACCRUED INTEREST ON BONDS.

(b) FRINCIPAL AND ACCRUED INTEREST OF	N DONDS.
Principal amount of Union bonds	\$1,877,000
Accrued and unpaid interest to April 1, 1937	
[R. 191] ²	402,555
Principal amount of Consumers bonds	1,137,000
Accrued and unpaid interest to April 1, 1937	
[R. 192] ²	221,715

Total

\$3,639,270

The foregoing values are values of the operating properties and do not include either current assets of Consolidated or value of the goodwill of Consolidated as a going concern. Mr. Mitchell testified that in his opinion the value of that goodwill was \$500,000.

²The Plan provides that the new bonds shall be dated and bear interest as of April 1, 1937.

(c) Equity of Consolidated Preferred Stockholders.

	Mitchell's Testimony	Gautier's Testimony	Rogers' Testimony
Value of operating properties ¹	\$3,917,300.00	\$3,910,000.00	\$3,768,000.00
Net current assets as of September 30, 1937		•.	
[R. 282]	342,784.01	342,784.01	342,784.01
Total assets (excluding good wil!)	4,250,084.01	4,252,784.01	4,110,784.01
Less total bonded debt of April 1, 1937	**		• -
[R. 189-192] ² .	3,639,270.00	3,639,270.00	3,639,270.00
Stockholders' equity	620,814.01	613,514.01	471,514.01
Good will ⁸	500,000.00	500,000.00	500,000.00
Stockholders' equity,			•
including good will	\$1,120,814.01	\$1,113,514.01	\$971,514.01

Obviously, the enterprise as a whole is solvent. Both the Master and the District Court so found. [R. 153, 245.] If we use the highest figures given for Consumers and for Union, each of them is solvent. The Trial Court

¹Inasmuch as Mr. Rogers did not testify to the value of the Consolidated properties, the lower of the two valuations given to these properties by Messrs. Mitchell and Gautier has been included in this figure.

²The plan is effective as of April 1, 1937.

³Messrs. Gautier and Rogers did not testify as to goodwill, and therefore the value of this item given by Mr. Mitchell has been included for the purposes of comparison.

could have done this. It apparently used average figures and found those two subsidiaries insolvent when considering only the assets admittedly subject to the liens of their respective indentures.

The true situation can be shown most clearly by setting forth separately the facts and figures first, accepting the petitioners' contentions as correct and second, accepting the respondent's contentions as correct. They are as follows:

Example I. Assuming Petitioners' Position to Be

It has been shown already, sugra, pages 14-16, that any rights under the operating agreement which may be reached by the bondholders must be determined by the agreement as modified in 1933. Accepting this, the situation then should be as follows:

- (1) Consumers and Union are insolvent on the basis of the assets admittedly subject to their respective liens. (If the Trial Court had seen fit to use the highest appraisals, these corporations would have been solvent. Gautier Appraisal as to Consumers [R. 290]; Rogers Appraisal as to Union and Reliance. [R. 292.])
- (2) There is no present claim by either Union or Contumers against Consolidated. (No claim exists until the termination of the operating agreement and it ran until February 16, 1938, with an option in Consolidated to extend it for an additional five years. [R. 180-181.])

- (3) Consumers and Union bondholders will have to establish their deficiency against Consumers and Union by foreclosure and a subsequent appraisal under California law. The bondholders cannot reach any claim under the operating agreement directly, for the operating agreement is not for the benefit of third parties.
- (4) Foreclosure will require segregation of properties. This means a three-cornered fight between Union, Consumers and Consolidated. It also means heavy expense and the wrecking of the enterprise as a going concern.
- (5) Consumers and Union will have to terminate the operating agreement in accordance with its terms.
- (6) Appraisers will have to be appointed and make their report before the amount of the claim can be determined. This determination will take a substantial amount of time and involve considerable expense.
- (7) Once the claim is determined, neither Consolidated nor Union can reach the *assets* of Consolidated. Consolidated is given the option of paying the claim in ten yearly installments and the assets cannot be reached unless there is a default by Consolidated under that agreement.

Consolidated is contributing assets valued, using averages of the valuation testimony, at over \$1,359,000 as against the contribution of the operating companies totaling approximately \$3,354,000. The assets being contributed by Consolidated are, under the present valuation figures, subject at most to a claim in favor of the bondholders amounting to approximately \$290,000. Before the bondholders can establish any rights under this claim they

must have a foreclosure sale and an appraisal to establish the value of the properties subject to the bond indentures. If such properties are appraised at or above \$3,639,270.00, the bondholders will have no rights directly or indirectly under the operating agreement. Even if such a right is established in favor of the bondholders, it is only a right, the payment of which may be deferred for the most part until 1953.

While contributing approximately 22% of the assets of the combined enterprise, the preferred stockholders retain the right to elect only five out of nine directors and accept a junior position respecting both income and principal. If anything seems apparent, it is that any unfairness is to the disadvantage of the preferred stockholders and not of the bondholders.

Example II. Assuming Respondent's Position to Be Correct.

Even if we assume that the agreement of 1933 is void and that the original agreement is in full force and effect, the position is not very materially altered. On this assumption we have the following situation.

Union and Consumers will be solvent because to their assets will be added their claim against Consolidated, thereby adding \$1,359,784, or, if goodwill is omitted, \$859,784. If this is added to each company in the proportion indicated on the balance sheet [R. 317, 319] Union's assets will be increased roughly \$806,352 with goodwill, and \$509,852 without, while Consumers would be increased

\$553,432 and \$349,932 respectively. Now, if we recalculate the value of the assets of Union and Consumers on that basis, and deduct bond principal and interest from each, we find the following result:

Union		Consumers	
Union assets (average of ap- praisals)	\$2,202,733	Consumers assets (average of appraisals)	\$1,151,033
Proportion of tangible assets	*	Proportion of tangible assets	
of Consolidated	509,852	of Consolidated	349,932
Total	\$2,712,585	Total	\$1,500.965
Principal and accrued interest to Apr. 1, 1937, Union Bonds	2,279,555	Principal and accrued interest to Apr. 1, 1937, Consumers	
1		bonds	. 1,358,715 .
Equity on tangible		Equity on tangible	in .
assets	\$ 433,030	assets	\$ 142,250
Add proportion of good will (60% of	•	Add proportion of good will (40% of	
\$500,000)	300,000	\$500,000)	200,000
Overall equity	\$ 733,030	Overall equity	\$ 342,250

The preferred stockholders are still contributing approximately 22% of the assets of the combined enterprise while they retain the right to elect only 5 out of 9 directors and accept a junior position respecting both income and principal. How can it fairly be said that such a plan unduly favors the preferred stockholders to the detriment of the bondholders?

The foregoing discussion of this case and examples demonstrate three things: First, the highly complicated problem with which the District Court had to deal; second, the futility of and lack of need for any so-called independent appraisal; and third, that the treatment afforded to the bondholders is very fair considering their contribution to the new enterprise.

The interested parties who conscientiously struggled with this problem for years realized the almost hopeless problem of arriving at a plan which would meet with the requisite approval. It must be borne in mind that twothirds of the Consumers' bondholders, at one time confident of upsetting the operating agreement, proposed and approved a plan of reorganization separate and apart from Consolidated and Union: [R. 269-70.] Both the Union bondholders' Committee and the Consumers' bondholders' Committee had as able counsel as is available on the question of the enforceability of the operating agreement and the effect of the modification thereof. Despite this move on the part of the Consumers' Committee and the study of the validity of the operating agreement and its modification by counsel for both/Committees, both groups approved the plan now before this Court. Now its consummation has been placed in jeopardy, not by an interested party who has tried to aid in the solution, but by one who acquired his bonds just before and just after the institution of these proceedings at an average cost of fifteen cents on the dollar. Now, this lone objector, setting himself up as the Guardian Angel of the bondholders who, he says, could not themselves afford to attack the plan, seeks to upset it and force the parties to resort to expensive and futile appraisals as well as expensive and time-consuming litigation of doubtful value, though he has never affirmatively taken a constructive part in the formulation of any plan. It is indeed a strange cloak for respondent. Does he close his eyes to the fact that there were individuals holding blocks of bonds in amounts from \$10,000 to \$30,000, who consented to the plan? [R. 296.] Does he close his eyes to the fact that the Consumers' bondholders at one time approved a separate plan of reorganization but thereafter approved this plan? Does he really believe that this plan would not have been fought by these people if they had felt it inequitable and unfair? His charitable garments do not fit, and his angelic guise is a bit incongruous:

Respondent has taken the position that the preferred stockholders get too much. Does he forget that these people were not speculators; that when they bought their stock there were no liens or claims ahead of them, and that their stock called for but a 6% return, the same rate as his bonds. Does he forget that while the preferred stockholders have received only five quarterly dividends since their investment of \$7,000,000 in 1929 [R. 246], the bondholders have received their interest payments, until March and July 1934, and their sinking fund requirements until September 1933 and July 1934? [R. 191-193.] Does he forget that continued separate operation of Union and Consumers would have resulted in hopeless default much sooner than was the case under the unified operation made possible by the preferred stockholders? [R. 305-311.] Furthermore, can it be said that this plan is, by any stretch of the imagination, unfair to this respondent?

"The trial court was familiar with all of these factors and the host of problems involved in this reorganization. Its judgment should stand.

Conclusion.

The decision of the Circuit Court of Appeals erroneously. overruled reasonable and fair determinations of the District Court. The Circuit Court of Appeals misconstrued the fair and equitable standard in ruling that the preferred stockholders cannot be given an interest in the properties of Union and Consumers as provided by the plan. The Circuit Court of Appeals misconstrued the fair and equitable standard in ruling that the plan could not, over a lone bondholder's objection, give to each of the two groups of bondholders an interest in the property of the other. The Circuit Court erred in failing and refusing to confirm the decree of the District Court on the ground that the plan is unfair and inequitable. Therefore, we respectfully urge that this Court reverse the Circuit Court of Appeals in all respects and reinstate the decree of the District Court approving the plan.

Respectfully submitted,

Paul R. Watkins, Dana Latham,

Attorneys for Petitioners.

APPENDIX.

Fact Comparison of Present Case

Los Angeles Lumber Products Co.*

- I. Securities affected by the plan:
 - (a) \$3,800,000 principal and interest fingage bonds.
 - (b) 57,000 shares of Class A Common
 - (c) 5,000 shares of Class B Common S

II. Value of enterprise and solvency:

- (a) Value of all properties of debtors par value of bonded debt, \$3,800,00 court finds that liquidation at froncern value will pay the bonded 25% of their claim.) (Decision p. 119.)
- (b) The debtor is found to be insolved the equity and in the bankrupt (This court characterizes it as "insolvent.") (Decision page 124)

III. Justification for the 23% participation of stock.

- (a) A contract between the intereste antedating the 77b proceedings and foreclosure provided for the plan of zation.
- (b) Avoidance of expense and damage closure.

^{*}These facts and figures are taken from this Court's Lumber Products case (supra.)

lidated Rock Products and Subsidiaries*

Securities affected by the plan:

nsolidated	Union	Consumers	
shs. pfd. stock shs. com. stock	Common Stock (No. of shares immaterial)	Common stock (No. of shares immaterial) Bonds—1,200,000	
creditors)	Bonds—1,970,000 (No other creditors)	(No other creditors)	

Value of enterprise and solvency:

nsolidated	. Union	Consumers	
0,000 exclusive	\$2,200,000	\$1,150,000	
good will and le name. [R. 2]	1.		
nded Debt-	\$2,330,000	\$1,390,000	
bonded debt	(Principal and accrued interest)	(Principal and accrued interest)	

rency-

on and Consumers insolvent; Consolidated enterprise solvent. 245.]

Justification of participation by preferred stockholders of Consolidated:

- (a) Even assuming that the bondholders can reach assets of Consolidated the enterprise is solvent by \$480,000 (summary above).
- (b) If the bondholders cannot reach the assets of Consolidated its preferred stockholders contributed \$850,000.00 plus good will and trade name valued at \$500,000.00. [R. 281-2.]

ess otherwise designated these figures are from the Circuit Opinion dated November 4, 1939.

Los Angeles Lumber Products Co.* (cont'd).

(c) Maintenance of a going concern.

(d) Stockholders had financial standing a fluence beneficial to corporation.

IV. Financial structure under the plan:

- (a) 640,000 shares of \$1.00 par value stot the bondholders).
- (b) 188,000 shares of \$1.00 par value or stock (to the Class A stockholders we subscription or assessment).

^{*}These facts and figures are taken from this Court's des Lumber Products case, (supra.)

idated Rock Products and Subsidiaries* (cont'd).

- (c) In order to reach Consolidated's assets each bondholder group must foreclose its lien, establish a deficiency, if any, then succeed in a favorable construction of the operating agreement and the voiding of the modification of the operating agreement.
- (d) Consolidated's preferred stockholders contributed more than \$7,000,000 to the enterprise, acquired preferred stock subject to no prior lien and should not, under the circumstances, be entirely eliminated.

Financial structure under the plan:

- (a) All the assets of all the companies in one new company.
- (b) \$1,507,000 par value new bonds (this represents one-half of present bonds).
- (c) \$1,507,000 par value preferred stock (30,140 shares at \$50 per share). (This represents one-half of the present bonds.)
- (d) 285,000 shares of common stock (\$2.00 par value). (To present preferred stockholders of Consolidated.)
- (e) Additional shares of common stock to be converted through warrants.

s otherwise designated these figures are from the Circuit. Opinion dated November 4, 1939.

Los Angeles Lumber Products Co.* (cont'd),

- V. Effect on securities affected by the plan:
 - (a) Bonds—converted into preferred stool ing a par value of \$640,000 (roughly of the par value of the cancelled lond interest thereon).

(b) Stock—Class B stock eliminated (this sented old interest on bonds). Class obtains 23% of the assets and voting

^{*}These facts and figures are taken from this Court's del Lumber Products case (supra.)

dated Rock Products and Subsidiaries* (cont'd).

Effect on securities affected by the plan:

(a) Bonds-

- 1. Full principal converted into one-half bonds and one-half preferred stock against all assets of all companies.
- 2. Cancels accrued interest in the amount of \$625,000.00.
- 3. Changes interest rate from 6% to 5% and makes it cumulative on the new bonds and non-cumulative on new preferred stock.
- 4. Eases default provisions but gives bondholders management control on default.
 - 5. Prevides for common stock warrants.
- (b) Stock of Union and Consumers—eliminated.
- (c) Common stock of Consolidated—eliminated except for warrant rights.
- (d) Preferred stockholders of Consolidated-
 - 1. Surrenders for cancellation \$166,000 par value of bonds of Union and Consumers.
 - 2. Obtains common stock of new company share for share.
 - 3. Becomes subject to prior lien of new bonds and prior claim of new preferred stock.

otherwise designated these figures are from the Circuit pinion dated November / 1939.

California Code of Civil Procedure

§ 726. Recovery of debt or enforcement of right secured by mortgage: Proceedings in foreclosure suits There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

Commissioner, appointment, compensation and och. The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office.

Decree, matters to be declared and determined: Deficiency proceedings: Appraiser. The decree for the foreclosure of a mortgage or deed of trust secured by real property or any interest therein shall declare the amount of the indebtedness or right so secured and, unless judg-

ment for any deficiency there may be between the sale price and the amount due with cost is waived by the judgment creditor, shall determine the personal liability of any defendant for the payment of the debt secured by suchmortgage or deed of trust and shall name such defendants against whom a deficiency judgment may be ordered following the proceedings hereinafter prescribed. In the event of such waiver the decree shall so declare and there shall be no judgment for a deficiency. In the event that · a deficiency is not waived and it is decreed that any defendant is personally liable for such debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property or the interest therein sold as of the date of sale, the court shall render a money judgment against such defendant or defendants for the amount bywhich the amount of the indebtedness with interest and costs of sale and of action exceeds the fair value of the property or interest therein sold as of the date of sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest from the date of sale and of costs, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said mortgage or deed of trust. Notice of such hearing must be served upon all defendants who have appeared in the action and against whom a deficiency indement is sought, or upon their attorneys of record, at least fifteen days before the date set for such hearing. Upon application of any party made at least ten days before the date set for such hearing the court shall,

and upon its own motion the court at any time may, appoint one of the inheritance tax appraisers provided for by law to appraise the property or the interest therein sold as of the time of sale. Such appraiser shall file his appraisal with the clerk and the same shall be admissible in evidence. Such appraiser shall take and subscribe an oath to be attached to the appraisal that he has truly, honestly and impartially appraised the property to the best of his knowaledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation, not to exceed \$5 per day, and expenses for the time actually engaged in such appraisal, which may be taxed and allowed in like manner as other costs.

Unrecorded claim. No person holding a conveyance from or under the mortgager of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action.

Sale by commissioner. If the court appoint a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of Chapter I, Title IX, Part II, of this code are hereby made applicable to sale made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner.

Death, etc., of commissioner: Appointment of elisor, etc. In all cases heretofore, now or hereafter pending in the courts of this State, in the event of the death, absence from the State, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section, the court may, upon the happening of either the death, absence from the State, other disability or disqualification of the commissioner, appoint an elisor to perform the duties of such commissioner which are then to be performed in such action. The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is appointed to succeed, with like effect as if such duties had been performed by the commissioner.

Property in two or more counties. If the land mort-gaged consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff, commissioner or elisor, as the case may be, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county. [Enacted 1872; Amended by Stats. 1893, p. 118; Stats. 1895, p. 98; Stats. 1901, p. 48; Stats. 1933, p. 2118; Stats. 1937, chap. 353.]

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1940 • No. 400.

In the Matter of

CONSOLIDATED ROCK PRODUCTS GO., a Delaware corporation,

Debtor.

UNION ROCK COMPANY, a corporation,

Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,

Subsidiary

CONSOLIDATED ROCK PRODUCTS CO., a corporation, and EDWARD E. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

V.

E. BLOIS du BOIS,

Respondent.

REPLY BRIEF FOR PETITIONERS.

PAUL R. WATKINS,
DANA LATHAM.

1112 Title Guarantee Building, Los Angeles,
Attorneys for Petitioners.

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Petitioners.

E. BLOIS du BOIS,

Respondent.

REPLY BRIEF FOR PETITIONERS.

Introductory.

The respondent and the S.E.C. in their briefs set forth several contentions, some in answer to matters contained in our opening brief and some involving new matters, to which we wish to reply. Summarized our reply is as follows:

THE DISPUTED CLAIM ARISING OUT OF THE OPERATING AGREEMENT.

- 1. The Disputed Claim Was Compromised
- 2. On Its Merits the Compromise Should Have Been Approved by the Circuit Court.
 - a. There is no net current account existing in favor of Union and Consumers.
 - b. The fact that Consolidated could properly defer payment of amounts due under the operating agreement is very important.
 - c. Any alternative to the compromise will involve foreclosure proceedings.

VALUATION.

1: The Present Findings of Value Are Clearly Adequate.

WARRANTS TO COMMON STOCKHOLDERS.

1. The Plan is Not Unfair in Giving Stock Purchase Warrants to the Present Common Stockholders.

'ALLEGED DISCRIMINATION AGAINST UNION BONDHOLD-ERS IN FAVOR OF CONSUMERS BONDHOLDERS:

1. The Plan Does Not Unfairly Discriminate Against Union Bondholders in Favor of Consumers Bondholders.

DISREGARD OF SEPARATE CORPORATE ENTITIES.

1. To Disregard Separate Corporate Entities in the Present Case Would Be Grossly Unfair to Consolidated Preferred Stockholders.

STATUS OF RESPONDENT.

The Disputed Claim Arising Out of the Operating Agreement.

1. THE DISPUTED CLAIM WAS COMPROMISED.

In our first specification of error we contended that the disputed claim had been compromised and that the Circuit Court erred in refusing to approve the compromise.

(Br. pp. 10-17.)

In answer to this contention both respondent and the S.E.C. assert that there never was a compromise of the claim. (Resp. Br. p. 17; S.E.C. Br. pp. 40-41.) record shows that the representatives of both groups of bondholders were at all times fully aware of the rights under the operating agreement. [R. 275-6, 278.] record shows further that the parties fought over a plan of reorganization for almost two years before one was worked out which was acceptable to all interested groups. The Special Master expressly found that the plan took into consideration all of the claims, equities and rights of the bondholders and stockholders. [R. 159.] In the light of these facts it is clear that the plan embodies a compromise of these claims on a basis which the interested groups felt was fair and in the best interests of all. The respondent and the S.E.C. rely heavily upon the fact that the compromise was not spelled out in the plan. (Resp. Br. p. 17; S.E.C. Br. pp. 40-41.) In this connection it should be noted that the most confroverted issue, the application of income to service the new bonds, which issue was compromised, was not spelled out in the plan. Certainly it cannot and is not contended that that controversy was not compromised. The confention that the disputed claim was not compromised is without merit,

In support of this first specification of error that the Circuit Court erred in refusing to sanction the compromise of the disputed claim arising out of the operating agreement, we pointed out that any rights of Union and Consumers arising out of the operating agreement were rights the discharge of which by the terms of the modified operating agreement Consolidated was entitled to defer for the most part until 1953. (Br. pp. 12-16.) We pointed out further that before the bondholders could have established in the bankruptcy proceedings their right to any claim of their corporation against Consolidated, a cumbersome, expensive and time-consuming proceedure would have to be followed and that this fact was an additional. reason why the compromise, reached by the parties bargaining at arm's length, should not have been disapproved. (Br. pp. 16-17.)

On the merits of the compromise both the respondent and the S.E.C. assert that it is immaterial that Consolidated may properly defer payment of any claims due under the operating agreement for the most part until 1952. (Resp. Br. pp. 18-19; S.E.C. Br. pp. 38-39.) The S.E.C., referring to some June 30, 1938, balance sheets of Consolidated, Union and Consumers, further asserts that there are current accounts payable totaling over \$250,000 due by Consolidated to Union and Consumers and that these amounts together with rights under the operating agreement entitle the bondholders to be made whole and accordingly the plan is unfair where they are not given securities for accrued interest,

There Is No Net Current Account Existing in Favor of Union and Consumers.

With regard to the alleged net current amounts payable in favor of Union and Consumers the contention of the S.E.C. is wholly erroneous. By Section 7 of the operating agreement [R. 167-8] Consolidated agreed to pay Union and Consumers amounts sufficient to pay interest on outstanding bonds. The accounting procedure followed was for Consolidated to credit the subsidiaries' current accounts monthly for the bond interest due and the allocable portion of the bond discount and expense, and when payment of the interest was made, to charge their current accounts with the interest paid. Since April 1, 1937, the effective date of the present plan, Consolidated has continued to credit the subsidiaries' current accounts with bond interest and the allocable portion of the bond discount and expense. This practice is reflected by the Consolidated income statement [R. 315] showing that these items were on June 30, 1938, still being accounted for on Consolidated's books. During the periods, April 1, 1937-June 30, 1938, Consolidated has credited the current accounts with 15 x \$15,116.67 or \$226,750.05 for interest and 15 x \$1,192.00 or \$17,880.00 for the bond discount and expense, of a total of \$244,630.05 for these items. The June 30, 1938, balance sheet of Consolidated [R. 316] shows a net account payable due upon termination of the operating agreement amounting to \$256,598.56. Why does the S.E.C. use June 30, 1938?. Why didn't it calculate the balance, as above, as of April 1, 1937, the effective date of the plan? That date is the only date which can be fairly used. Any credits by Consolidated to the current accounts for interest and bond discount and expense made after April 1, 1937, cannot, for the purposes

of this proceeding be considered as current amounts presently due to Union and Consumers. Even if we assume that the operating agreement was terminated in 1938 as the S.E.C. contends we must, these subsequent credits still could not be considered here.

b. The Fact That Consolidated Could Properly Defer Payment of Amounts Due Under the Operating Agreement Is Very Important.

Both the respondent and the S.E.C. assert that it is of no consequence that the claim against Consolidated is one payment of which Consolidated could properly defer for the most part until 1953. (Resp. Br. pp. 18-19; S.E.C. Br. pp. 39-39.) They both assert that if the bondholders can prove that their claim exists, they are entitled to be made whole, regardless of the fact that such rights are not present rights but are for the most part rights maturing in 1953. The same premise is used by both the respondent and the S.E.C. elsewhere in their briefs as the basis for arguing that the plan is not fair and equitable because the bondholders are not fully compensated. Certainly it will not be doubted that the fundamental purpose of Section 77B is to preserve to all parties the value of their interests in the enterprise. As of the effective date of this plan, April 1, 1987, Consolidated owned assets having a value of approximately \$1,359,000 which it could by the terms of the operating agreement operate

The S.E.C. contends that the operating agreement must be considered as having terminated in 1938 since the Record fails to disclose notice by Consolidated of intent to renew. (S.E.C. Br. p. 37.) We respectfully submit that since the crucial date here is April 1, 1937 this contention is irrelevant, and further that the contention is erroneous in that the record fails to show that the agreement was terminated, but rather, it shows clearly that the enterprise is being operated just as it was prior to the commencement of the present proceedings.

until 1953 free, for the most part, of any claims of Union or Consumers arising out of the operating agreement. (Br. p. 29.) To treat this situation, as the respondent and the S.E.C. do, the same as one where Consolidated owned these properties subject to a presently due claim in favor of Union and Consumers evidenced by presently due promissory notes rather than by promissory notes due several years hence and where Consolidated, would be under an immediate obligation to sacrifice the assets to meet such claim is to absolutely disregard the factual difference between the two situations as well as to disregard the purpose of Section 77B to preserve, to all groups the value of their respective interests. Their contention assumes fallaciously that one with assets which he may operate for a long period, paying off a claim at the end of that period, is in the same position as one with assets that must immediately be sacrificed for payment of a presently due claim. A recognition of the difference in the two situations when applied to the facts of the present case refutes this contention of the respondent and of the S.E.C. that the preferred stockholders are not entitled to share under the plan until the bondholders are fully compensated. The bondholders do not have a present right to assets equal to or in excess of their bond principal plus accrued interest. Accordingly, it is not necessary that they be fully compensated before the preferred stockholders be allowed to participate in the plan.

The true picture is then as we have set it forth, in our opening brief. (Br. pp. 26-33.) Consolidated contribut-

ing substantial assets; Union and Consumers contributing a larger portion of the assets; all assets going into a new enterprise; the question being, have all parties been given interests in the new single enterprise, commensurate with their separate contributions? We submit that the answer is in the affirmative.

c. Any Alternative to the Compromise Will Involve Foreclosure Proceedings.

In support of the plan's compromise of the disputed claim, as noted above, we pointed out that any alternative steps taken with a view to determining the rights of the bondholders against Consolidated would require an expensive time-consuming and cumbersome foreclosure procedure. (Br. pp. 6-17.) This fact was not set forth to suggest the use of obstructive tactics by any group, but merely to show correctly the alternatives open to the interested parties. The respondent answers that this procedure may be eliminated by a sale of the properties of Union and Consumers by the respective indenture trustees. (Resp. Br. pp. 19-20.) However, there is nothing in the record that even suggests that the indenture trustees have a power of sale.

The S.E.C. answers that no foreclosure proceedings are, necessary but that the bondholders could waive their security and assert an unsecured claim against Union and Consumers, respectively, for the full amount of the bonds plus accrued interest. This we submit is erroneous. Before the bondholders could assert any unsecured claim against.

Union and Consumers, respectively, it would be necessary that they have such a valid enforceable claim under California law for such amount.

- 2 Gerdes on Corporation Reorganization (1st Ed., 1936), Sec. 883;
- 2 Remington on Bankruptcy (4th Ed., 1915), Sec. 955.

By California law the indenture trustees for these mortgagees can enforce the rights growing out of the debts secured by a mortgagee only by following the procedure set forth in Code of Civil Procedure, Section 726 (Br., Appendix II.) This statute was enacted for the very purpose of avoiding the result suggested by the S.E.C. was enacted to insure mortgagors that they should first have their obligations discharged to the full and fair value of the security before the mortgagee could assert any deficiency claim. It is not a question of obstructive tactics. It is merely a fact that the procedure there set forth must. be complied with before the bondholders can assert a right, valid and enforceable under California law, to any claim existing in favor of Union and Consumers against Consolidated. The avoidance of such a procedure which would bring about the wrecking of the entire enterprise is another reason why the compromise should be approved and why the parties should not be forced to litigate this disputed claim.

Valuation.

1. THE PRESENT FINDINGS OF VALUE ARE CLEARLY ADEQUATE.

The plan here involved is based upon valuations determined from testimony of experts who have worked with the properties in question for years. (Br. pp. 19-20.) There is no one in a position to know the values of the properties as well as these witnesses. Yet the S.E.C. contends that the evidence does not warrant proper findings of value because there is insufficient evidence as to earnings. The S.E.C. would substitute for the judgment of these extremely well qualified witnesses some hypothetical future earnings record which would at most be a guess based upon the prior operations during the greatest depression period in modern history and upon the past physical makeup of the enterprise which physical makeup will be tremendously improved by the liquidations of unneeded property as anticipated under the present plan. On these facts such a guess as to future earnings would be quite inadequate as a criterion of value.

Warrants to the Common Stockholders.

1. THE PLAN IS NOT UNFAIR IN GIVING STOCK PUR-CHASE WARRANTS TO THE PRESENT COMMON STOCK-HOLDERS.

Both the respondent and the S.E.C. assert that the plan is unfair because the common stockholders are given stock purchase warrants whereas it has been found that they have no equity. (Resp. Br. pp. 34-35; S.E.C. Br. pp. 33-34.) This assertion is based upon the assumption that these warrants have some value. The warrants

will entitle the old common stockholders to purchase, within three months of the date of the warrants, 1/5th of a share of new common stock for each share of old common held, at a price of \$1.00 per share of new common. Whether these warrants will or will not have any value is entirely problematical. When the plan was devised all interested parties felt that it was highly advisable to obtain badly needed cash by this method to defray the costs of reorganization. The bondholders were given warrants exercisable over a long period of time in an effort to allow them to participate in the equity if the reorganized enterprise proved highly successful. In any event the old common stockholders can only come in by furnishing new capital. Since their warrants expire in three months and since the early months of the enterprise are bound to be uncertain, it is not unfair to give such warrants to the old common stockholders when, as is done here, the bondholders are given warrants, exercisable over a much longer period, even though at a higher price. In the Lumber Products case this court recognized that there are times when it may be proper for the common stockholders to be given stock purchase warrants even though they have no equity. We respectfully submit that the warrants to be issued to the old common stockholders in this case does not render the plan unfair toward the objecting bondholders who receive warrants exercisable up to within 5 years from their date.

¹Case v. Los Angeles Lumber Products Co. Limited, 308 U. S. 106, 117 (1939).

Alleged Discrimination Against Union Bondholders in Favor of Consumers Bondholders.

1. THE PLAN DOES NOT UNFAIRLY DISCRIMINATE AGAINST UNION BONDHOLDERS IN FAVOR OF CONSUMERS BONDHOLDERS.

Respondent asserts in his brief that the plan is unfair in that it provides that the income shall be used equally to service the bonds and preferred stock of the present Union bondholders and to service the bonds and preferred stock of the present Consumers bondholders. (Resp. Br. pp. 39-42.) He points out that the present Union bondholders are contributing more assets to the new enterprise than are the present Consumers bondholders and that therefore more than half of the income should be applied to servicing the bonds and preferred stock of the present Union bondholders. The respondent omits to point out that the question of the application of income to servicing the new securities was only one of three major points of dissension encountered in formulating a plan acceptable to both the Union Committee and the Consumers Committee and that the solution reached on this point is only part of a general compromise of all three major points [R. 68-70, 84-86]. This omission itself makes the objection here lose any merit it might otherwise have. Further, this lone objector seeks to have this court substitute his judgment for the judgment. of the District Court, of the Special Master and of the Committees who arrived at the present plan only after almost two years of bitter controversies. This we submit should not be done.

Disregard of Separate Corporate Entities.

1. To DISREGARD SEPARATE CORPORATE ENTITIES IN THE PRESENT CASE WOULD BE GROSSLY UNFAIR TO CONSOLIDATED PREFERRED STOCKHOLDERS.

The S.E.C. has suggested that because the assets of Union, Consumers and Consolidated have been commingled by Consolidated in conducting unified operations of the operating properties, this Court should disregard the corporate entities and add all properties of Consolidated to the properties of Union and Consumers, treating all as securing the claims of the bondholders. This suggestion overlooks the fact that since the execution of the operating agreement in 1929 Consolidated has applied all net income with the exception of five quarterly dividends [R. 240] to the satisfaction of bond interest, retirement and sinking-fund requirements. It overlooks the fact that notwithstanding that during the depression beginning in 1929 the combined volume of operations was reduced, because of the influx of ruthless competition into the industry, from 75% of the business done in Southern California to approximately one-third of such business [R. 142, 238], the enterprise, by reason of unified operations possible only through the investment by the preferred stockholders of approximately \$7,000,000 was able to stave off defaults of bond interest and sinking-fund and retirement requirements until late 1933 and early 1934. In the light of the benefits to the bondholders which have been derived from unified operations made possible only by the preferred stockholders' investments, it would hardly be equitable to follow this novel suggestion of the S.E.C.

Status of Respondent.

In our opening brief we have contended that this court should consider the facts that this lone objector purchased his bonds immediately prior and subsequent to the commencement of the present 77B proceedings at an average price of approximately fifteen cents on the dollar, and that he has at all times occupied the position of an objector refusing to act reasonably in trying to work out a fair plan acceptable to all concerned. The record discloses, and there actually was no constructive suggestion by respondent during the entire proceeding. [Br. pp. 32-33; R. 156-158, 196-206, 246-256.] Respondent answers that such matters deserve no consideration by this court.

In a recent study published by the S.E.C. under date of September 30, 1940, and which has come to our attention since filing our opening brief, the S.E.C. discusses the equitable treatment of obstructionists who have purchased their claims at bargain prices. The S.E.C. concluded that in determining the voting power of claims the bankruptcy court should consider the bad faith of and the cost of the claims to the obstructionist. Only recently in the case American United Mut. Life Ins. Co. v. City of Avon Park, Fla., this court in citing the In re McEwen's Laundry, Inc. case expressed its apparent approval of

¹Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VIII, pp. 113-125.

³⁶¹ S. Ct. 157, 162.

⁸90 Fed. (2d) 872 (C.C.A. 6th, 1937).

such use by the bankruptcy court of its equitable powers. We submit that the same equitable principle which motivates such use of the general equity power should lead this court to weigh heavily the status of the respondent, the lone objector.

Respectfully submitted,

Paul R. Watkins,
Dana Latham,
Attorneys for Petitioners.

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Supreme Court of the United States-

OCTOBER TERM, 1940.
No. 400

CONSOLIDATED ROCK PRODUCTS Co., a corporation, and EDWARD F. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

US.

E. Blois buBois, an objecting bondholder of record in the Plan of Reorganization,

Respondent.

Respondent's Brief on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Bankruptcy Act, Sec. 77B, 48 Stat. 912 (11 U. S. C. A., Sec. 207) 4
Judicial Code, Sec. 240a, as amended (28 U. S. C. A. 347 (a))

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Supreme Court of the United States

October Term, 1940. No. 400

CONSOLIDATED ROCK PRODUCTS Co., a corporation, and EDWARD F. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders Committee of Consolidated Rock Products Co.,

Petitioners,

715

E. Blois buBois, an objecting bondholder of record in the Plan of Reorganization,

Respondent.

Respondent's Brief on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The petitioners, Consolidated Rock Products Co., a corporation, and Edward E. Hatch and Louis Van Gelder, constituting the Preferred Stockholders Committee of said corporation, seek review on certiorari of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered on June 19, 1940 [R. 365-380]. Slight modification of the supporting opinion was ordered August 5, 1940 [R. 382-383].

The judgment and order have not yet appeared in the official reports.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under Section 240a of the Judicial Code, as amended (28 U.S. C. A. 347(a)).

Grounds on Which the Petitioners Seek Review.

Petitioners seek review by this Court on the following grounds:

- 1. Alleged error of the Circuit Court of Appeals in finding as a matter of law that the plan of reorganization involved is unfair and inequitable under the rule of Case v. Los Angeles Lumber Products Co., 308 U. S. 106, in the face of findings of (a) solvency of the debtor; (b) an equity in the stockholders, and (c) compromise of a bona fide dispute.
- 2. Alleged error of the Circuit Court of Appeals in finding as a matter of law that the plan of reorganization is unfair and inequitable under the "full priority" rule of Case v. Los Angeles Lumber Products Co., because the two original bond issues involved are merged into one covering all properties of all companies.
- 3. Alleged error of the Circuit Court of Appeals in usurping the function of the District Court by finding the plan unfair and inequitable in the face of the findings of fact below.
- 4. That the judgment below presents a fundamental question of law applicable to numerous pending plans of reorganization of solvent corporations and is therefore of public importance.

At various points in the petition and brief the decision below is attacked by petitioners upon these further grounds:

- 1. Alleged erroneous application of the decision of this Court in Case v. Los Angeles Lumber Products Co., supra, in:
 - (a) Holding that a plan of reorganization of a solvent corporation is unfair as a matter of law if stockholders are permitted to salvage an existing equity;
 - (b) Holding that such a plan is unfair as a matter of law because stockholders of a corporation, upon the property of which there are no existing liens, are permitted to participate in the reorganization as a result of compromise of an alleged liability of the corporation to its subsidiaries, upon the properties of which are existing first mortgage liens;
 - (c) Holding that a plan of reorganization of a solvent corporation must be disapproved merely because, in the opinion of the Court, a controversy compromised as part of the plan was of little merit;
- 2. Alleged error of the Circuit Court of Appeals in applying the "fixed principle" of Case v. Los Angeles Lumber Products Co., supra, to the reorganization of a solvent corporation involving compromises between the interested parties.
- 3. Alleged error of the Circuit Court of Appeals in ignoring the District Court's findings of fact and substituting its judgment for the judgment of the interested parties, the special master and the District Court, result-

ing in a "shameful inequity" and a preference of the subsidiaries' bondholders over the stockholders of the solvent parent corporation, all contrary, petitioners assert, to the decision in *In re 620 Church Street Building Corporation*, et al., 299 U. S. 24, 27.

- 4. The judgment if permitted to stand will effectually destroy all possibility of reorganizations under Section 77B of the Bankruptcy Act, even of solvent corporations, unless it conclusively appears from the record that creditors have been provided for in full before stockholders are permitted to participate, thus defeating the purpose of the enactment of Section 77B.
- 5. Purchase of his bonds by respondent, who alone appealed from the judgment of the District Court confirming the plan of reorganization, at depression prices far below the face value of the bonds.

Questions Presented.

The questions presented are indicated by the foregoing summary of petitioners' contentions.

Statute Involved.

The statute here involved is Section 77B of the Bank-ruptcy Act, 48 Stat. 912, 11 U. S. C. A. §207. Judgment of the trial court was entered prior to the effective date of the Chandler Act.

STATEMENT OF THE CASE.

1. The Proceedings Below.

The judgment complained of reversed the judgment of the District Court for the Southern District of California, Central Division, confirming a plan of reorganization involving Consolidated Rock Products Co. and its two subsidiaries, Union Rock Company and Consumers Rock and Gravel Company, Inc. For brevity, Consolidated Rock Products Co. will hereinafter be referred to as "Consolidated," Union Rock Company as "Union" and Consumers Rock and Gravel Company, Inc., as "Consumers."

The plan of reorganization was presented by Consolidated, the Union Bondholders' Protective Committee and the Consumers Bondholders' Protective Committee [R. 20]. Objections to the plan were filed by respondent. He owns First Mortgage Serial and Sinking Fund Gold Bonds of Union in the principal amount of \$150,000, and First Mortgage Sinking Fund Gold Bonds of Consumers in the principal amount of \$31,500 [R. 156]. The plan was confirmed on September 8, 1938, after hearings before a special master and the trial court [R. 231-265]. Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit. That Court affirmled the judgment of the trial court on November 4, 1939, one judge dissenting. The decision, Du Bois v. Consolidated Rock Products. Co, is reported in 107 Fed. (2d) 96.

Petition for rehearing was filed by respondent after decision by this Court in Case v. Los Angeles Lumber Products Co., supra. On February 19, 1940, the Circuit Court of Appeals vacated its decision, granted a rehearing, and directed the filing of further briefs [R. 363-364]. After submission of further briefs the decision of June 19, 1940, reversing the judgment of the District Court confirming the plan of reorganization, was entered.

2. The Relationship of the Corporations Involved in the Reorganization.

Consolidated was organized January 28, 1929 [R: 134]. It has no bonded indebtedness, but has issued and outstanding 285,947 shares of no par preferred stock, and 397,455 shares of no par common stock [R. 111].

In the year of its organization Consolidated purchased all outstanding stock of Union and Consumers, both of which were then important factors in the rock, sand and gravel industry of Southern California [R. 132-136]. Both Union and Consumers then had outstanding bond issues secured by trust indentures upon their respective properties [R. 134].

Consolidated by its purchase of the outstanding stock of Union also gained control of Reliance Rock Company, a wholly owned subsidiary of Union [R. 133, 160], as well as certain other of Union's wholly owned subsidiaries [R. 319].

After purchase of Union and Consumers by Consolidated an operating agreement was entered into by the three companies, in which Reliance Rock Company, als though a wholly owned subsidiary of Union, joined. The agreement bore date July 15, 1929, but was made effective as of April 1, 1929 [R. 160-175]. The purpose of this operating agreement apparently was to permit Consolidated to operate all the companies as a unit while each maintained its separate legal status. Under the agreement the subsidiaries transferred to Consolidated all of their cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand-and contracts for the sale of materials [R. 152], and gave Consolidated the full right to operate their plants and other properties [R. 165]. Consolidated agreed, among other things, to maintain the properties [R. 166], to keep full and complete accounts reflecting transactions between the companies [R. 167], to pay Union and Consumers from time to time all amounts necessary to comply with the provisions of their respective trust indentures [R. 167-168], and to pay all operating expense: [R. 170-171]. Consolidated, in return was authorized by the operating agreement to retain for its own use and benefit all net revenue resulting from operation of the properties [R. 170-171].

After execution of this operating agreement Union, Reliance and Consumers ceased to exist as operating companies, and Consolidated assumed every function of management and ownership [R. 140-141].

A purported modification of the original operating agreement was entered into on February 16, 1933 [R

176-182]. It was executed on behalf of Consolidated by its President, F. J. Twaits, and its Secretary, Robert Mitchell, each of whom acted in the identical capacity for each of the subsidiary companies [R. 140-141].

Consolidated continued operation of all the companies under the operating agreement to the date of institution of proceedings for reorganization [R. 276]. Since then it has continued operation as a debtor left in possession.

Holders of common stock of Consolidated have no equity. This is tacitly conceded by the plan which permits their participation in the reorganization only upon further contribution [R. 31]. Absence of equity is further demonstrated by the valuation of \$1.00 at which the total outstanding common stock is carried on the books of Consolidated [R. 314].

3. Summary of the Plan of Reorganization.

Briefly stated, the plan of reorganization [R. 20-65] contemplates a new corporation to which all properties of Union and Consumers, together with the allegedly free assets of Consolidated, will be transferred, discharged of all liens and claims. The new corporation will issue new 5% bonds, maturing 20 years after April 1, 1937, in the principal amount of \$1,507,000, secured without distinction by lien upon all the properties transferred to it. The new bonds will be divided into Series U and Series C, comprising principal amounts of \$938,500 and \$568,500, respectively.

At the present time Union bonds in the principal amount of \$1,979,500 remain outstanding, of which bonds in the

rincipal amount of \$102,500 are held by Consolidated R. 189]. Consumers bonds in the principal amount of 1,200,500 remain outstanding at this time, of which onds in the principal amount of \$63,500 are held by consolidated [R. 189].

Under the plan present Union bondholders will receive new Series U bond in the principal amount of \$500 for ach \$1,000 in principal amount of present bonds held. Present Consumers bondholders will receive like distribuion of the Series C bonds. The Union and Consumers and beid by Consolidated will be cancelled [R. 79].

The new corporation will also issue 30,140 shares of % preferred stock of the par value of \$50 per share, ivided into Series U preferred stock of 18,770 shares and Series C preferred stock of 11,370 shares. Present Union bondholders will receive 10 shares of the Series D preferred stock having a total par value of \$500 for each \$1,000 in principal amount of present Union bonds eld. Present Consumers bondholders will receive like istribution of the Series C preferred stock [R. 28-30].

Series U and Series C preferred stock will be non-umulative until all new bonds of the corresponding series re-retired [R, 47].

Both series of preferred stock will carry stock purchase variants entitling holders to purchase common stock of the new company at \$2.00 per share during a period of ix months, and at higher rates thereafter [R. 30].

The new corporation will issue 425,718 shares of comnon stock, par value \$2.00 per share. Of these shares of common stock present preferred stockholders of Consolidated will receive 285,947, or one share for each share of present Consolidated preferred stock held by them. No payment of any kind is required of them. 60,280 shares of common stock will be reserved for issuance upon possible exercise of stock purchase warrants attached to new Series U and Series C preferred stock [R. 27].

Holders of the present common stock of Consolidated will receive stock purchase warrants entitling them at any time within three months after date to purchase one share of the new common stock for each five shares of present Consolidated common stock held, at a price of \$1.00 per share [R. 31].

Not exceeding 50% of the "available net income" of the new corporation, as defined in the plan [R. 37-40], will be applied first to servicing the Series U bonds and preferred stock and meeting certain sinking fund requirements. The remaining 50% thereof will be applied to like purposes with respect to the Series C bonds and preferred stock. Any surplus net income will be available for general corporate purposes [R. 37; 47-49].

The plan makes no provision with respect to delinquent interest on the outstanding Union and Consumers bonds. It cancels all inter-company obligations [R. 28, 31]. The books of Consolidated show that corporation indebted to Union and Consumers under the operating agreement in an amount exceeding \$5,000,000 [R. 281].

The effective date of the plan is fixed at April 1, 1937.

4. The Effect of the Plan.

From the foregoing it is seen that the plan accomplishes the following results:

- (a) It destroys the liens securing the present Union and Consumers bonds and, without payment of such bonds, deprives the bondholders of their right of foreclosure;
- (b) It deprives present Union and Consumers bondholders of 50% of their bond principal, substituting therefor a non-cumulative preferred stock;
- (c) It cancels, without compensation, accrued bond interest amounting as of April 1, 1937, the effective date of the plan, to \$659,690, and as of September 8, 1938, the date of confirmation by the District Court, to approximately \$881,460;
- (d) It reduces interest return to $41\frac{2}{3}\%$ of that called for by the present bonds, and makes payment dependent on operating income, with default provisions so lenient that they are almost unconscionable [R. 39; 42-43].
- (e) It effectively extends the time for payment of the present Union and Consumers bonds;
- (f) It cancels inter-company obligations and thus relieves Consolidated of indebtedness to Union and Consumers in excess of \$5,000,000, which constitutes part of the security for the present bonds [R. 300-302], or at least a fund to which bondholders might resort for full payment of their bonds and interest;
- (g) It maintains the preferred stockholders of Consolidated in their present position of full equity ownership and in full control of the new corporation, without additional contribution or sacrifice of any kind on their part.

Summary of Argument.

Petitioners misconstrue the decision in the instant case as well as in Case v. Los Angeles Lumber Products Co., supra. Here the plan was properly disapproved because of plain violation of the full priority rule reannounced in the cited decision of this Court. The subsidiary corporations involved, Union and Consumer's, are both insolvent. Yet their creditors are compelled by the plan to share their insufficient assets with stockholders of Consolidated. The contention that the full priority rule is not applicable because of solvency of the united enterprise is entirely beside the point and without merit in any event.

None of the reasons presented by petitioners in justification of the plan permit the full priority rule to be disregarded.

The decision of the Circuit Court of Appeals properly applies the rule in holding, as a matter of law, that the plan is unfair. No findings of fact of the District Court were improperly set aside.

The decision, properly construed, does not prevent substitution of a common issue of bonds for the present. Union and Consumers issues.

No case for exercise of the jurisdiction of this Court is made out by the petition.

ARGUMENT.

Petitioners' Misconception of the Decision of the Circuit Court of Appeals.

The petition and supporting brief misconstrue and distort the decision complained of. The decision does not declare the plan of reorganization unfair and inequitable because thereunder stockholders of Consolidated are permitted to salvage an existing equity, or because such stockholders are allowed participation as the result of compromise of an alleged liability of Consolidated to its subsidiaries, or because, in the opinion of the court, a compromise of a controversy of little merit is involved in the plan. Nor is the plan declared unfair and inequitable because the outstanding Union and Consumers bond issues are thereunder replaced by a new common issue of bonds.

Petitioners' assertions to the contrary are without foundation.

A reading of the decision discloses that the plan was declared unfair and inequitable for one reason alone, namely: that it fails to accord full priority to Union and Consumers bondholders and, on the contrary, compels them to share with stockholders of Consolidated the already insufficient assets to which they are entitled to look for payment of their bonds.

The correctness of the Court's decision is easily demonstrated. As it points out, the assets of Union and Consumers securing their respective bond issues are insufficient in each case to discharge the bonds and accrued interest [R. 377]. All assets of both companies secure

their respective bonds [R. 301-302]. Both Union and Consumers then are insolvent.

However, their combined assets have a value of \$3,-300,000,¹ while the principal amount of bonds held by the public is only \$3,014,000 [R. 240-241]. Consequently there are assets of the value of \$286,000 available for discharge of accrued interest after all principal obligations liave been met.

That the plan seriously invades the property rights of the Union and Consumers bondholders is apparent. Louisville Joint Stock Bank v. Radford, 295 U. S. 555. Accrued interest is cancelled although assets are available to discharge it in part; bond principal is reduced by 50% although secured in full; bondholders are compelled to accept a non-cumulative preferred stock in lieu of the 50% of bond principal taken from them; their interest return is reduced to $41\frac{2}{3}\%$ of that called for by the present bonds and is made payable on an income basis; the time for payment of the bonded indebtedness is extended; certainty of future regularity in servicing of the new bonds is jeopardized by lenient default clauses in the indenture.

While bondholders of Union and Consumers are so treated, the present holders of preferred stock of Consolidated exchange their stock for the common stock of the new company, share for share, and without additional contribution to the reorganized enterprise. Today all equity after recognition of bondholders is lodged in these preferred stockholders of Consolidated; tomorrow, if the plan is confirmed, all equity in the reorganized enterprise

¹The special master did not report separately as to the value of Union and Consumers assets. The value of \$3,300,000 includes the assets of Reliance Rock Co. These are properly included as that Company is a wholly owned subsidiary of Union.

will also be lodged in them except as bondholders and present holders of common stock of Consolidated may acquire new common stock by purchase.

In other words, holders of the preferred stock of Consolidated maintain their present position. Only the evidence of their ownership of the equity is changed. But their equity position is strengthened and the value of their equity is enhanced by each step in the drastic treatment of Union and Consumers bondholders outlined in the plan. What is taken from bondholders is in effect given to present holders of preferred stock of Consolidated; they benefit in direct proportion to the extent that bondholders' property rights are invaded.

The plan does not recognize the rule of Kansas City Terminal Rv. Co. v. Central Union Trust Co., 271 U.S. 445, 455, that "to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation." It ignores the "familiar rule" reaffirmed by Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co., 174 U. S. 674, 684, that "the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors." Its effort to compel bondholders "to share the already insufficient assets with stockholders" merits only the condemnation voiced in In re 620 Church St. Corp., 299 U. S. 24, in Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, in Case v. Los Angeles Lumber Products Co., supra, and in the long' line of cases cited by this Court in its last mentioned decision.

The invasion of the property rights of the bondholders to benefit stockholders of Consolidated is in violation of the Fifth Amendment. Louisville Joint Stock Bank v.

Radford, supra; Railroad Retirement Board, et al. v Alton Railroad Co., et al., 295 U.S. 330, 357.

Petitioners' misconception of the decision of the Circuit Court of Appeals is further emphasized by their assertion that it gives the Union and Consumers bondholders "the prior position against all the property of the subsidiaries and Consolidated."

The declaration is without foundation. The Court merely found the plan to be unfair and inequitable. That conclusion of law was based entirely on the diversion to Consolidated's stockholders of property of the insolvent Union and Consumers as to which bouldholders of those two corporations are entitled to full priority.

Petitioners' Misconception of the Rule of Case v. Los Angeles Lumber Products Co

Petitioners devote some six pages of their brief to a comparison of the facts of this case and those presented by Case v. Los Angeles Lumber Products Co.; supra.

The importance here of Case v. Los Angeles Lumber Products Co. lies not so much in the similarity of the facts presented in the two cases, but rather in its unequivocal declaration that reorganization proceedings under the Bankruptcy Act must be governed by the "full priority" rule of the cases above cited, and in its reiteration of judicial condemnation of "any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors, ..."

Petitioners make no attack upon the "fixed principle." They contend, however, that it is applicable only in the reorganization of an insolvent corporation. They point

out the finding of the District Court that while Union and Consumers are insolvent, the united enterprise—Consolidated considered with the two subsidiaries—is solvent. The argument overlooks the fact that it is the properties of the insolvent Union and Consumers which are diverted from creditors to stockholders, and that it is for this reason the plan must meet with judicial condemnation.

But regardless of its irrelevancy, petitioners' doctrine is a novel one. Stated in other words, it would compel an insolvent debtor to relinquish all of its property to its creditors; a solvent debtor, however, having the ability to discharge its debts in full, would be permitted to bind all creditors by any arrangement, regardless of its fairness, which the debtor could persuade two-thirds of its creditors to accept.

Language of Case v. Los Angeles Lumber Products Co., supra, is given by petitioners in support of their novel doctrine. No other authority is presented. In the cited case the debtor corporation was insolvent not only in the equity sense, but in the bankruptcy sense as well. So are Union and Consumers here. The language of the cited decision is naturally tied definitely to the facts which this Court had before it. There is nothing in the language, however, which remotely suggests that a solvent corporation in reorganization is to be granted immunity from the fixed principle of full priority of creditors.

Petitioners' doctrine is not supported by the cases. It is obviously devoid of logic.

Petitioners repeatedly reiterate that Consolidated and the enterprise as a whole are solvent, that there are no liens against the properties of Consolidated, and that Consolidated did not assume payment of the Union and Consumers bonds when it acquired the stock of those companies. They fail to point out, however, how these facts can justify an appropriation of property upon which the bondholders have a mortgage lien for the benefit of holders of the preferred stock of Consolidated.

3. The Compromise Referred to by Petitioners as Justification of the Plan.

It is argued by petitioners that the plan of reorganization should have been upheld because in it is involved a compromise of a disputed liability of Consolidated to Union and Consumers. No details are given for the information of the Court.

Reference is apparently made to the provisions of the plan cancelling all inter-company obligations [R. 26; 32], and the further provisions cancelling Union bonds in the amount of \$102,500, and Consumers bonds in the amount of \$63,500, owned by Consolidated [R. 55]. Full records were kept reflecting accounts between Consolidated and the subsidiaries under the operating agreement of 1929 [R. 280-281]. They show Consolidated indebted to the subsidiaries in the sum of \$5,727,939.09, against which there is a set-off of \$540,707.58 [R. 281]. Adding to this latter amount the \$166,000 representing the face value of subsidiary bonds owned by Consolidated, that corporation is still indebted to Union and Consumers, after all set-offs, in an amount exceeding \$5,000,000.

The plan called attention to the cancellation of bonds owned by Consolidated. No mention was made, however, of any compromise through which Consolidated rid itself of the staggering indebtedness to the subsidiaries.

Throughout these proceedings respondent has attacked the cancellation of this indebtedness. He has contended that under the after-acquired property clauses of the Union and Consumers indentures [R. 301-302] the indebtedness was part of the security behind the bonds, or at least a fund which could be reached by the bondholders if deficiencies resulted upon foreclosure sale of the properties admittedly subject to the indentures. He has contended further that if the assets of Consolidated were applied to payment of the indebtedness owing to Union and Consumers the bondholders of the subsidiaries could be paid in full, both interest and principal, while Consolidated would be stripped to a point where its contribution to any reorganization would be infinitesimal at the most.

Respondent does not feel that the Court need be bothered with discussion of this controversy. Petitioners do not attempt to explain how the tremendous advantage gained by Consolidated through cancellation of the intercompany obligations can be urged in justification of the plan's further invasion of the already insufficient properties to which Union and Consumers bondholders admittedly are entitled to look for payment of their bonds. Assuming that cancellation of the inter-company obligations is entirely proper, bondholders are nevertheless entitled to full priority as to the Union and Consumers properties remaining. The plan does not accord them this priority.

The Circuit Court of Appeals in its decision pointed out the necessity for some determination of the controversy. However, it declared the plan in violation of the full priority rule entirely independent of any consideration of the plan's cancellation of inter-company obligations.

4. Miscellaneous Considerations Advanced by Petitioners as Justifying the Plan.

Certain additional reasons are given by petitioners to support their contention that the Circuit Court of Appeals should not have disapproved the plan. It is argued that the District Court exercised that informed and independent judgment required by National Surety Co. v. Coriell, 289 U. S. 426, and Case v. Los Angeles Lumber Products Co., supra. Reference is made to the long period of time which elapsed between the filing of the petition under §77B and the confirmation of the plan by the District Court. The argument assumes that time is the essence of informed and independent judicial judgment. It leads petitioners to the absurd conclusion that judicial error should be overlooked if it occurs despite diligent and sincere judicial effort.

Petitioners also seek to justify the plan because of (1) Consolidated's solvency and absence of liens against its properties; (2) purchase by holders of preferred stock of Consolidated of their stock for \$7,000,000 and without prior claims; (3) the occurrence of violent disputes between the two bondholder groups, and between both groups and Consolidated; (4) the necessity of legal determination of rights as between the two bondholder groups; (5) repeated threats of litigation; (6) the necessity of foreclosure under the trust indentures and establishing of deficiencies before the bondholders could assert any claim against Consolidated under the operating agreement; (7) the express provision of the operating agreement that it was not made for the benefit of third parties; (8) protracted negotiations leading up to the submission of the plan; (9) approval of the plan by the requisite majorities.

Respondent has briefly discussed the first of the above grounds in his discussion of petitioners' misconception of the rule of Case v. Los Angeles Lumber Products Co., supra. The second ground is equally irrelevant.

Disputes did occur between the Union and Consumers bondholders with respect to division of income between them in any new corporation. The delay in formulating a plan resulted primarily from these disputes [R. 273-274]. This fact might be of importance in considering the fairness of the plan from the standpoint of any preference of one bondholder group over the other; it is irrelevant when a plan has been condemned because it diverts to stockholders property as to which all bondholders are entitled to full priority.

No one denies that Consolidated threatened litigation unless it was relieved of its \$5,000,000 indebtedness to the subsidiaries under the operating agreement [R. 275-276]. The nature of its position is indicated by the lack of merit in the defenses it alleged [R. 276]. The following language of this Court in Case v. Los Angeles Lumber Products, supra, is peculiarly applicable:

"The conclusion of the District Court that avoidance of litigation with the stockholders gave validity to their claim for recognition in the plan involves a misconception of the duties and responsibilities of the court in these proceedings. Whatever might be the strategic or nuisance value of such parties outside of §77B is irrelevant to the duties of the court in confirming or disapproving a plan under that section. In these proceedings there is no occasion for the court to yield to such pressures. If the priorities of creditors which the law protects are not to be diluted, it is the clear duty of the court to resist all such assertions." [Pages 129-30.]

However, as previously stated, the plan was condemned for reasons entirely apart from the problems involved in a consideration of the rights and liabilities of the parties to the operating agreement. Consequently petitioners' sixth and seventh grounds listed above are irrelevant to a consideration of the petition here.

The eighth and ninth grounds given for justifying the plan are equally unimportant. Protracted negotiations prior to submission of a plan are no guarantee of fairness; nor does approval by the requisite majorities of interested parties protect an unfair plan from judicial denunciation. Taylor v. Standard Gas & Electric Co., 306 U. S. 307; Case v. Los Angeles Lumber Products Co., supra.

None of the grounds stated by petitioners, nor all of them taken together, can justify the plan. They do not even measure up to the "ephemeral" value of the select group from the "host of intangibles" which this Court repudiated in Case v. Los Angeles Lumber Products, supra.

Respondent's Status As An Objector to the Plan of Reorganization.

Petitioners contend that the judgment below should not be permitted to stand "for equitable reasons." The "equitable reason" given is that respondent purchased his Union and Consumers bonds during the dark days of depression and at depreciated prices. For this petitioners stigmatize him as a greedy speculator. They picture him as an obstructionist because he has opposed the plan of reorganization here involved as unfair. Certainly no step has been taken by respondent in these proceedings which has been improper. The position taken by him from the outset has now been upheld by the Circuit Court of Appeals.

The consideration paid by respondent for his bonds is wholly immaterial in determining whether the plan is fair and equitable. Wade v. Chicago, Springfield & St. Louis Railway Co., 149 U. S. 327, 343.

If the plan here is fair, equitable and not discriminatory, it should of course be confirmed; but petitioners by innuendo urge that the plan regardless of its fairness should be confirmed simply because respondent alone has attacked it on appeal.

Long before the filing of any petition under Section 77B, respondent began the purchase of his bonds. The petition was filed May 24, 1935 [R. 267]. All respondent's \$31,500 of Consumers bonds were acquired between July 1, 1934, and April 17, 1935. When the petition was filed he was one of the large holders of Consumers bonds [R. 297].

Between September 20, 1934, and May 8, 1935, respondent acquired \$72,000 of Union bonds. Thereafter down to December 9, 1935, he purchased \$78,000 more of Union bonds [R. 297]. The plan of reorganization was not presented to the lower court until after March 15, 1937, more than two years after respondent had become a substantial bondholder.

In this connection an observation worthy of note was made by the Court in the case of Sophian v. Congress Realty Co., 98 Fed. (2d) 499, 502, when it said:

"In many reorganization proceedings such as this, the rights of small, scattered and thoroughly discouraged bondholders are involved. Often they are unable to employ counsel to protect their rights. It is of great importance that the courts of bankruptcy shall see to it that they are not unfairly dealt with."

The observation has peculiar application here. Respondent is by far the largest individual owner of Union bonds. These bonds are scattered among some 650 bondholders. The average holding is between \$2,500 and \$3,000 in principal amount [R. 296]. The average holding of Consumers bonds is approximately \$3,000 in principal amount [R. 294].

The proceedings herein have extended over a period of years. Two years elapsed before Consolidated and the Bondholders Protective Committees presented a plan. The judgment confirming the plan was not entered until September 8, 1938. It is not difficult to realize the discouraging effect of such delay upon small and scattered bondholders. In large measure respondent has borne the brunt of battle for all bondholders who could pursue no other course than to approve any plan presented after interminable delay. In some measure, it may be justly said, respondent has aided in making certain that assets belonging to creditors are not, by indirection, diverted to stockholders.

6. The Alleged Usurpation by the Circuit Court of Appeals of the Function of the Trial Court.

Petitioners assert that the decision below improperly set aside the findings of fact of the District Court. They brand this as a usurpation by the Circuit Court of Appeals of the function of the District Court as a trier of facts.

What findings of fact were disturbed on appeal is not pointed out with certainty. Petitioners probably have reference to the findings dealing with solvency of the united enterprise and "compromise" of Consolidated's liability under the operating agreement. They cannot have

in mind the finding of the District Court that the plan was fair and equitable, for that of course presents a question of law. Case v. Los Angeles Lumber Products Co., supra.

Having found the plan to be in violation of the full priority rule, and so unfair as a matter of law, the Circuit Court of Appeals did express its dissatisfaction with the condition of the record with respect to the value of properties of the various corporations involved. It made clear that in the face of the uncertainty appearing it was impossible to determine what participation, if any, the holders of the preferred stock of Consolidated are entitled to be given in any reorganization. This was in response to respondent's contention that insolvency of the united enterprise was established by the weight of the evidence [R. 282-283] and by the special master's specific findings [R. 151]. Respondent's twelfth, thirteenth and eighteenth assignments of error attacked all findings dealing with the value of Consolidated's assets and the existence of any equity in that corporation [R. 334-335; 336: 3411.

Nor is the Court's comment on the necessity of some determination of the rights and liabilities of the parties to the operating agreement improper. This responds directly to respondent's fourteenth, sixteenth and seventeenth assignments of error attacking failure of the special master to pass upon the issues raised as to the operating agreement [R., 337-338: 339-341]. The decision below, however, repudiates no finding of the District Court on this point for no finding was made. The general narrative statement that the plan was evolved after "efforts on the part of all three of the warring factions to compromise" their differences is not a finding that the subsidiaries in fact ever arrived at an agreement

with Consolidated with respect to the operating agreement [R. 244]. If it can be construed as a finding it was made by the District Court without evidence, and in face of its confirmation of the special master's report ignoring the point [R. 261].

But again we are dealing with inconsequential matters. Petitioners' contentions here do not bear on the crux of the case. They have no reference to the fixed principle of full priority. They do not justify the pian's confiscation of bondholders' property for the benefit of stockholders of Consolidated.

7. Substitution of a Common Issue of Bonds in Lieu of the Outstanding Union and Consumers Bonds.

Petitioners attack the decision on the ground that it makes impossible any reorganization under which separate and distinct issues of bonds are eliminated and replaced by one issue in which there is common participation. In the instant case the plan eliminates the outstanding Union and Consumers bonds, commingles all properties of both companies, and provides for a single issue of new bonds for issuance to Union and Consumers bondholders. It is contended that the decision of the Circuit Court of Appeals condemned the plan as unfair because of this.

Reference is made to the language of the Court reading as follows:

"It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders The grant of the series of the contraction of the series o

union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union's bondholders and debtor's preferred stockholders are given an interest in Consumers' property." [R. 377; italics ours.]

Respondent feels that the inclusion of the italicized words was unnecessary. He joined with all other parties in moving that they be stricken. The motion to strike was denied. From this it must be concluded that the Circuit Court of Appeals felt the parties were unduly apprehensive that an unwarranted construction could be placed upon the language used.

The portion of the Court's decision quoted follows immediately after a discussion of the law of Case v. Los Angeles Lumber Products Co., supra. The Court goes on to point out that although both Union and Consumers are insolvent, their properties are shared in under the plan by persons other than their respective creditors. Respondent is of the opinion that the Court, in using the language it did, intended only to emphasize the plain violation of the "full priority" rule. It should not be construed as a pronouncement of law that the outstanding Union and Consumers bonds cannot be replaced by a new issue in which both groups of bondholders participate jointly.

Respondent has never contended and does not now contend that under Section 77B it would be improper to eliminate the present Union and Consumers bonds and replace them by a common issue. He has attacked the division of income between Series U and Series C bonds under the plan as unfair to Union bondholders. His attack has gone no further.

The bondholders' committees of Union and Consumers have filed independent petitions seeking correction of the decision in this respect only. Respondent does not oppose such correction if this Court deems it necessary, although as indicated above he does not believe that the language of the Court, properly construed, establishes a rule of law.

Conclusion.

In concluding this brief respondent submits that the decision of the Circuit Court of Appeals is correct and that disapproval of the plan of reorganization here involved was compelled by Case v. Los Angeles Lumber Products Co., supra, and the earlier decisions of this Court pertaining to equity reorganizations. Petitioners have failed to show cause for the exercise of jurisdiction by this Court.

Respectfully submitted,

KENNETH E. GRANT, Attorney for Respondent.

MOTT AND GRANT, JOHN G. MOTT, HOWARD A. GRANT, Of Counsel.

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Supreme Court of the United States

October Term, 1940. No. 400

CONSOLIDATED ROCK PRODUCTS Co., a corporation, and EDWARD F. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co.,

Petitioners,

US.

E. Blois nu Bois, an objecting bondholder of record in the Plan of Reorganization,

Respondent.

BRIEF FOR RESPONDENT.

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Attorney for Respondent.

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HOWARD A. GRANT,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1940. No. 400

CONSOLIDATED ROCK PRODUCTS Co., a corporation, and EDWARD F. HATCH and LOUIS VAN GELDER, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co.,

Petitioners.

vs.

E. Blois Du Bois, an objecting bondholder of record in the Plan of Reorganization,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The judgment of the District Court affirming the plan of corporate reorganization herein involved [R. 231-265] was filed September 8, 1938. The first opinion of the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, one judge dissenting. It was filed November 4, 1939, and is reported in 107 Fed. (2d) 96, Advance Sheets. On respondent's petition

for rehearing the Circuit Court of Appeals vacated its decision and the judgment thereon and granted rehearing [R. 363-364]. On June 19, 1940, the second opinion of the Circuit Court of Appeals, reversing the judgment of the District Court, was filed [R. 365-380]. It is reported in 114 Fed. (2d) 102, Advance Sheets.

Jurisdiction.

Petitioners filed petition for rehearing on July 19, 1940. The petition was denied on August 5, 1940 [R. 382-383]. A petition for a writ of certiorari was filed in this Court on September 6, 1940, and was granted October 28, 1940.

Petitioners have invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. 347 (a)).

Questions Presented.

On this review the questions presented are:

- 1. Did the Circuit Court of Appeals correctly rule that a determination with respect to the indebtedness owing by Consolidated Rock Products Co., the parent corporation, to its two subsidiaries, Union Rock Company and Consumers Rock and Gravel Company, Inc., is essential to decision as to the extent of the property against which creditors of the subsidiaries are entitled to full and absolute priority to the extent of their debts?
- 2. Did the Circuit Court of Appeals correctly rule that a determination with respect to the value of the various properties involved in the reorganization is essen-

may be accorded stockholders in any plan of reorganiza-

3. Does the decision of the Circuit Court of Appeals, properly construed, rule that in any future plan of reorganization which may be presented, a common issue of bonds, with common security, cannot be substituted for

the separate and distinct bond issues of the subsidiary corporations now outstanding; and, if so, is such ruling

correct?

4. Did the Circuit Court of Appeals correctly rule that the plan of corporate reorganization proposed in these proceedings is unfair and inequitable in failing to accord to bondholders, as creditors of the subsidiary corporations involved, full and absolute priority to the extent of their debts against all the property of their debtors?

Statute Involved.

The statute involved is Section 77B (f) of the Bank-ruptcy Act (11 U. S. C. A. 207 (f)), the pertinent portion of which reads as follows:

After hearing such objections as may be made to the plan, the judge shall confirm the plan, if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any claims of creditors or stockholders, and is feasible.

STATEMENT OF THE CASE.

1. The Parties to the Case.

For brevity, Consolidated Rock Products Co. will here inafter be referred to as "Consolidated", Union Rock Company as "Union" and Consumers Rock and Gravel Company, Inc., as "Consumers".

The plan of reorganization here involved was presented by the debtor, Consolidated, the Union Bondholders' Protective Committee and the Consumers Bondholders' Protective Committee [R. 20], who, with the Preferred Stockholders' Committee of Consolidated, were the appellees before the Circuit Court of Appeals. Objections to the plan were filed by respondent [R. 95-128], the owner of First Mortgage Serial and Sinking Fund Gold Bonds of Union in the principal amount of \$150,000, and of like bonds of Consumers in the principal amount of \$31,500 [R. 156]. The plan was confirmed after hearings before a Special Master and the District Court [R. 231-265]. The subsequent appellate proceedings are indicated in respondent's opening statement covering the opinions below.

The first decision of the Circuit Court of Appeals—affirming the judgment of the District Court confirming the plan—was handed down two days before the announcement of the decision of this Court in Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106. On granting respondent's petition for rehearing the Circuit Court of Appeals directed the filing of further briefs with respect to the applicability of that decision to the instant case.

Thereupon the Securities and Exchange Commission and Edgar Shook, Esq., independently of each other, sought and received permission to file briefs as amici curiae [R. 373].

On this review only Consolidated and its Preferred Stockholders' Committee attack the correctness of the decision below in so far as it rules the plan to be unfair. In Docket No. 444 the Union and Consumers Bondholders' Protective Committees, appellees below, seek modification of the decision only. They are supported in their position by the memoranda filed by the Solici or General for the Securities and Exchange Commission and the Interstate Commerce Commission, appearing as amici curiae. The memorandum of the Securities and Exchange Commission, however, supports the position of respondent that the decision of the Circuit Court of Appeals, in so far as it rules the plan to be unfair, is correct.

2. The Relationship of the Corporations Involved in the Reorganization.

Consolidated was organized January 28, 1929. It has no bonded indebtedness, but has issued and outstanding 285,947 shares of no par preferred stock, and 397,455 shares of no par common stock [R. 111].

In the year of its organization Consolidated purchased all outstanding stock of Union and Consumers, both of which were then important factors in the rock, sand and gravel industry of Southern California [R. 132-136]. This was the purpose of the organization of Consoli-

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dated [R. 134]. Both Union and Consumers then had outstanding their present bond issues, secured by trust indentures upon their respective properties [R. 134]. Both issues have since been reduced by retirement of bonds. Union now has outstanding bonds in the hands of the public aggregating in principal amount \$1,871,000; the aggregate principal amount of Consumers bonds now publicly held is \$1,137,000 [R. 189]. Consolidated by its purchase of the outstanding stock of Union also gained control of Reliance Rock Company, a wholly owned subsidiary of Union [R. 133; 160], as well as certain other of Union's wholly owned subsidiaries [R. 319].

After purchase of Union and Consumers by Consolidated an operating agreement was entered into by the three companies. Reliance Rock Company, although a wholly owned subsidiary of Union, joined in the agreement. The agreement bore date July 15, 1929, but was made effective as of April 1; 1929 [R. 160-175]. purpose of this operating agreement apparently was to permit Consolidated to operate all the companies as a unit while each maintained its separate legal status. der the agreement the subsidiaries transferred to Consolidated all of their cash, securities, notes and bills and accounts receivable, book accounts, manufactured materials and materials in process, raw materials not in place, supplies actually on hand and contracts for the sale of materials [R. 162]. They gave Consolidated the full right to operate their plants and other properties [R. 165]. Consolidated agreed, among other things, to mainain the properties [R. 166]; to keep full and complete counts of inter-company transactions (including proper atries with respect to depreciation, depletion, amortization and obsolescence of the various properties) [R. 167]; pay Union and Consumers from time to time all mounts necessary to comply with the provisions of their espective trust indentures [R. 167-168]; and to pay all perating expenses [R. 170-171]. Consolidated in return as authorized by the operating agreement to retain for sown use and benefit all net revenue resulting from peration of the properties [R. 170-171].

After execution of this operating agreement Union, teliance and Consumers ceased to exist as operating ampanies, and Consolidated assumed every function of management and ownership [R. 140-141].

A purported modification of the original operating greement was entered into on February 16, 1933 [R. 76-182]. It was executed on behalf of Consolidated by President, F. J. Twaits, and its Secretary, Robert litchell, each of whom acted in the identical capacity for each of the subsidiary companies [R. 140-141].

Consolidated continued operation of all the companies of the operating agreement to the date of institution proceedings for reorganization [R. 27]. Since then has continued operation as a debter left in possession.

THE PLAN.

1. Factual Background Upon Which the Fairness of the Plan Must Be Determined.

The treatment of Union and Consumers bondholders must be judged in the light of existing facts shown by the record.

It must be noted, first of all, that the only parties having any interest in this reorganization are (a) the bondholders of Union and Consumers; (b) Consolidated, as the sole stockholder of Union and Consumers; and (c) indirectly through Consolidated, the preferred and common stockholders of that corporation. There are no junior lienholders or unsecured creditors to be considered except as account must be taken of the unsecured indebtedness owing by Consolidated to Union and Consumers [R. 314]. For all practical purposes we may eliminate Consolidated as an interested party and substitute its preferred and common stockholders in its stead. Consideration may be further simplified by also eliminating the common stockholders of Consolidated. They have no equity. The plan tacitly concedes this by its treatment of them [R. 31]; the books of Consolidated establish the fact [R. 314]; and the Special Master so found [R. 153]. Since all equity under the Union and Consumers bonds is vested in the preferred stockholders of Consolidated, we must examine the plan's treatment of Union and Consumers bondholders with full appreciation of the resultant effect of such treatment upon the subordinate position of the equity holders.

Treatment of the bondholders must also, of course, be examined with reference to the findings of the Special Master as to the extent and value of the properties against which bondholders are entitled to full priority over stockholders. He found that the value of the assets admittedly subject to the Union and Consumers trust indentures is insufficient to discharge the principal and accrued interest of the bonds [R. 153]. A value of "approximately" \$3,300,000 was placed by him on the combined properties of the two subsidiaries [R. 151]. For some reason the Special Master did not deem it necessary to make separate findings as to the value of the Union and Consumers assets. His combined valuation is evidently an average of the valuations given by all witnesses who testified to value. Their testimony was as follows, figures with respect to Union and Reliance being grouped:

Witnesse	s	Union .	Consumers
Mitchell	[R. 281-282]	\$2,150,200	\$1,267,100
Gautier	[R. 290]	\$1,940,000	\$1,436,000
Rogers	[R. 291-292]	\$2,518,000	\$ 750,000
Average		\$2,202,733	\$1,151,033

It will be noted that the total of the two averages is \$3,353,766, or \$53,766 in excess of the opecial Master's "approximate" finding.

The aggregate principal amount of Union and Consumers bonds publicly held is \$3,014,000 [R. 189]. The principal of the bonds is therefore secured more than 100%, with a surplus in assets of \$286,000 for payment of accrued interest. Such accrued and unpaid interest

on the publicly owned bonds, computed to April 1, 1937, amounts to \$625,270 [R. 191-192].\(^1\)

The valuation of \$3,300,000 is plainly intended by the

Special Master to apply to the assets "admittedly subject to the trust indentures" of Union and Consumers [R. 152-153]. Such assets, however, are not the only assets against which bondholders of those corporations are entitled to full priority over preferred stockholders of Consolidated. The Special Master made no finding as to the Union and Consumers assets not "admittedly subject" to the trust indentures", ignoring the existence of the indebtedness owing by Consolidated to Union and Consumers under the operating agreement. The record shows this indebtedness to be in excess of \$5,000,000 after all set-offs and after allowance on account of the \$166,000 of Union and Consumers bonds held by Consolidated [R. 281; 316, 312]. The Special Master found the assets of Consolidated to have a value of \$1,000,000, provided \$500,000 for good will is included [R. 151].²

²While the new bonds under the plan will be dated as of April 1, 1937, the plan was not confirmed by the District Court until September 8, 1938. Accrued and unpaid interest on the publicly owned bonds as of September 1, 1938, the approximate date of the order of confirmation, would be \$256,190. more than the figure as of April 1, 1937, or a total of \$881,460. These figures do not take into consideration the right of the bondholders to interest on the delinquent interest.

²The Special Master in reality did not find the value of the good will of Consolidated to be \$500,000. He said that "according to Mr. Mitchell's testimony, and including \$500,000. for mod will and going business value, the total value of the properties of Consolidated would be approximately \$1,000,000. ... [R. 151.] Mr. Mitchell was the only witness who expressed any opinion with respect to the value of the good will.

2. The Plan's Treatment of Union and Consumers Bondholders.

The plan of reorganization [R. 20-65] contemplates a new corporation to which all properties of Union and Consumers, together with the allegedly free assets of Consolidated, will be transferred, discharged of all liens and claims [R. 26]. The new corporation will issue new 5% bonds, maturing 20 years after April 1, 1937, in the principal amount of \$1,507,000, secured without distinction by lien upon all the properties transferred to it. The new bonds will be divided into Series U and Series C, comprising principal amounts of \$938,500 and \$568,500, respectively [R. 27].

At present Union bonds in the principal amount of \$1,979,500 remain outstanding, of which bonds in the principal amount of \$102,500 are held by Consolidated [R. 189]. Consumers bonds in the principal amount of \$1,200,500 remain outstanding at this time, of which bonds in the principal amount of \$63,500 are held by Consolidated [R. 189].

Under the plan present Union bondholders will receive a new Series U bond in the principal amount of \$500 for each \$1,000 in principal amount of present bonds held. Present Consumers bondholders will receive like distribution of the Series C bonds [R. 28-30]. The Union and Consumers bonds held by Consolidated will be cancelled [R. 79].

The new corporation will also issue 30,140 shares of 5% preferred stock of the par value of \$50 per share,

divided into 18,770 shares of Series U preferred stock and 11,370 shares of Series C preferred stock: Present Union bondholders will receive 10 shares of the Series U preferred stock having a total par value of \$500 for each \$1,000 in principal amount of present Union bonds held. Present Consumers bondholders will receive like distribution of the Series C preferred stock [R. 28-30].

Series U and Series C preferred stock will be noncumulative until all new bonds of the corresponding series are retired [R. 47].

Both series of preferred stock will carry stock purchase warrants entitling holders to purchase common stock of the new company at \$2.00 per share during the first six months, at \$4.00 per share during the second six months, at \$4.50 per share during the second year, at \$5.00 per share during the third year, at \$5.50 per share during the fourth year, and at \$6.00 per share during the fifth year. Each share of the preferred stock will carry with it the right to purchase two shares of the flew common stock on the basis stated.

The new bonds will be income bonds although the stipulated interest is 5%. Not exceeding 50% of the "available net income" of the new corporation, as defined in the plan [R. 3740], will be applied first to servicing the Series U bonds and preferred stock and meeting certain sinking fund requirements; not exceeding 50% thereof will be applied to like purposes with respect to the Series C bonds and preferred stock. Any surplus net income will be available for general corporate purposes [R. 40-42].

The plan cancels accrued and unpaid interest on the presently outstanding Union and Consumers bonds [R. 26]. As noted, this interest, as of April 1, 1937, the date as of which the new bonds will be issued, amounts to \$625,270.00, computation being made on the basis of publicly held bonds only [R. 191, 192].

The plan also cancels all inter-company obligations [R. 26].

3. The Plan's Treatment of the Preferred and Common Stockholders of Consolidated.

The provisions of the plan with respect to the preferred and common stockholders of Consolidated are in striking contrast to the drastic treatment accorded Union and Consumers bondholders.

The new corporation will issue 425,718 shares of common stock, par value \$2.00 per share [R. 27]. Of these shares present preferred stockholders of Consolidated will receive 285,947 on the basis of one share for each share of the present Consolidated preferred stock held by them [R. 31]. No payment or additional contribution is required of them.

The holders of the present common stock of Consolidated will receive stock purchase warrants entitling them at any time within three months to purchase one share of the new common stock for each five shares of present Consolidated common stock held, at a purchase price of \$1.00 per share [R. 31].

60,280 shares of the common stock will be reserved for issuance upon possible exercise of stock purchase warrants attached to new Series U and Series C preferred stock [R. 27].

ARGUMENT.

Summary.

Since any indebtedness owing to Union and Consumers is an asset against which their bondholders are entitled to full priority to the extent of their debts over stockholders, the Circuit Court of Appeals correctly ruled that the \$5,000,000 claim of Union and Consumers against Consolidated under the operating agreement must be determined, "voluntarily or by litigation". Likewise the Circuit Court of Appeals correctly ruled that in order to apply the full priority rule, accurate determination must be made of the value of the properties of the various corporations involved in the reorganization.

The decision below does not, as contended by petitioners, hold the plan to be unfair because of the substitution of a common issue of bonds with common security for the present Union and Consumers bonds.

As held by the Circuit Court of Appeals, the plan here is unfair in its disregard of the full priority rule and discriminates unfairly in favor of the present stockholders of Consolidated. In final analysis the plan sanctions a repudiation of corporate debt and the appropriation of properties, upon which the bondholders have existing claims, to enrich the stockholders of Consolidated.

POINT I.

The Indebtedness of Consolidated to Union and Consumers.

Petitioners first attack the decision of the Circuit Court of Appeals because of its reference to the indebtedness owing by Consolidated to its subsidiaries under the operating agreement.

As noted, the plan cancels all inter-company obligations, resulting in discharge of an indebtedness of Consolidated to Union and Consumers under the operating agreement in excess of \$5,000,000 after all set-offs and, after allowance on account of the \$166,000 of Union and Consumers bonds held by Consolidated [R. 281, 316]. The fairness of the plan in this respect was questioned by respondent in the District Court by his Objection IV (4) [R: 100], and he prayed that definite determination be made of all inter-company obligations [R. 107]. The failure of the Special Master to make any findings concerning the operating agreement, or the huge indebtedness of Consolidated thereunder shown by the evidence. was attacked by respondent's Exceptions VI and VII [R. 201]. Denial of these exceptions was assigned as error on appeal, as was the cancellation of the inter-company obligations [R. 331].

Heretofore Consolidated has denied liability under the operating agreement [R. 276].

In speaking of the claim of Union and Consumers against Consolidated the Circuit Court of Appeals said:

"It can be seen therefore that until the claim is settled, either voluntarily or by litigation, there is no way to determine the fairness of any plan of re-

organization, because until it is known what assets are subject to payment of the bonds, we have no way of knowing what the bondholders will lose, if anything." [R. 374.]

Petitioners first attack this language as a specific ruling that any dispute as to the rights and liabilities of the parties to the operating agreement cannot be compromised, and as a general ruling condemning compromises in §778 proceedings. The plain language of the court carries no such implications. The court states simply that the claim here involved must be determined; it leaves to the parties whether such determination shall be made "voluntarily or by litigation". Voluntary settlement of necessity implies the right of compromise.

In the instant case respondent by appropriate pleading questioned the fairness of the plan in cancelling the intercompany obligations resulting from the operating agreement. The issue raised, bearing as it did on the fairness of the plan, should have been determined by the District Court. Since the institution of these proceedings there has never been, nor is there now, any necessity for "litigation" of this issue outside of these proceedings. It is inextricably involved in the fairness of any plan of reorganization which may be presented, and the jurisdiction of the District Court to determine the issue cannot be disputed.

This is the type of "litigation" referred to by the Circuit Court of Appeals in the quoted portion of its decision.

Retitioners' second attack upon the quoted portion of the decision is upon the ground that it constitutes an improper repudiation of a compromise with respect to the operating agreement and the inter-company obligations worked out by the negotiators of the plan. Some language of petitioners' brief would indicate that they question the right of the court to inquire into the details or propriety of a compromise embodied in a plan of reorganization, regardless of how seriously such compromise may affect the fairness of the plan.

In reality, however, there was no compromise with respect to the rights and liabilities of the parties to the operating agreement. Compromise implies some give and take, which is entirely absent in the cancellation of the inter-company obligations. The indebtedness of Consolidated was simply arbitrarily cancelled. No mention of any such compromise is made in the plan, although a separate article is devoted to the cancellation of the \$166,000 of Union and Consumers bonds held by Consolidated [R. 55]. The negotiators were seemingly satisfied that the enterprise as a whole was solvent, and took the position that (1) Consolidated and its stockholders were therefore possessed of an equity which justified some preferred stockholder participation under the plan, and (2) that, the enterprise being solvent, any indebtedness of Consolidated under the operating agreement was in fact owed by it to itself. This is indicated by the evidence [R. 277] and is reflected by the judgment of the District Court [R. 253-254]. Assuming solvency this position was entirely sound except as it overlooked the fact that bondholders of Union and Consumers would have to be made whole before their rights against the indebtedness owing by Consolidated to their debtors could be ignored.

On this review petitioners, for the first time, admit that Consolidated is bound by the operating agreement of July 5, 1929. They now say that the dispute, with respect to the indebtedness of Consolidated to Union and Consumers revolves around the "contention of the objecting bondholder .. . that the agreement of 1933 is void". The agreement referred to is the amendment to the original operating agreement. It is true that respondent has attacked the validity of this amending agreement upon the grounds that it was not supported by real. consideration, that there was no reality of consent to the amendment by the subsidiaries, and that the amendment is a patent fraud upon the subsidiaries and their bondholders. In view of the changed position of petitioners, however, the validity of the amendment need not be disease cussed here. Petitioners no longer deny liability; they simply contend (1) that the extent of Consolidated's liability must be determined by a board of appraisers upon termination of the operating agreement as provided by the 1933 amendment and (2) that any indebtedness of Consolidated to the subsidiaries may then be paid, 25% in equal annual installments over a period of ten years, and the remaining 75% at the end of the tenth year. Consequently, they say, there is no "present liability" of Consolidated to Union or Consumers.

The argument overlooks the fact that the consummation of the plan will terminate the operating agreement and also that even under the amendment to the operating agreement of 1933 the only indebtedness of Consolidated

which could be deferred is "the portion sented by 'depreciation' [R. 179]. However, that a present liability exists goes without saying, regardless of whether in the absence of these proceedings and of the plan's cancellation of inter-company obligations Consolidated might elect to discharge its indebtedness over a period of years. On this review it is the existence of the indebtedness that is important; it is unimportant for all practical purposes whether the indebtedness owing by Consolidated is \$5,000,000 or merely \$1,000,000, or how payment was originally provided to be made. The Special Master found the value of the Union and Consumers properties to be \$3,300,000. This figure is roughly 25% of the inflated book value of \$13,500,000 at which petitioners say these properties were carried on the books, and on the basis of which depreciation, depletion and obsolescence credits to the subsidiaries were given. If we assume, then, that the \$5,000,000 indebtedness of Consolidated should be reduced by 75% the indebtedness is still \$1,250,000. So far as the fairness of the plan' here involved is concerned, the result is not changed.

Petitioners argue that the "compromise" should be sanctioned because the debt could be reached by bond-holders only after foreclosure and entry of a deficiency judgment, and also because of the provision of the operating agreement that it is not made for the benefit of third parties. It is not readily perceptible how such considerations can possibly justify cancellation of Consolidated's debt to the subsidiaries, against which the bondholders are

entitled to full priority over stockholders to the extent of their debts. Petitioners refer to Section 726, California Code of Civil Procedure, set forth in their appendix, as limiting any deficiency judgment which might be obtained to the difference between the aggregate bonded indebtedness and the appraised value of the property as of the date of sale. The code section referred to would not apply, however, to foreclosure under the power of sale of the trust indentures, in which case deficiency judgments would be entered without appraisal and without limitation as provided in Section 726.

Bank of America v. Burg Bros., 31 Cal. App. (2d) 352;

Kirkpatrick v. Stelling, 100 Cal. App. Dec. 335; Pac. States Sav. & Loan v. Painter, et al., 100 Cal. App. Dec. 860.

But in these proceedings we are concerned with the fairness of a plan of reorganization and not with the obstacles which might or might not be placed in the way of bondholders if foreclosure were necessary. None of the points presented by petitioners can justify the arbitrary cancellation of the indebtedness of Consolidated, which, if paid only in small part, would make bondholders whole. It follows that the Circuit Court of Appeals correctly declared that so long as this indebtedness is, in dispute, some determination with respect to the dispute is essential to intelligent consideration of any future plan which may be presented in these proceedings.

POINT II.

The Court's Insistence Upon a Determination of the Values Involved.

The Circuit Court of Appeals closed its opinion with the following language:

"While we agree that the 'values' of the various properties is necessary to a complete determination as to the fairness of any plan, and that a 'fresh examination into such question' should be made, no arguments are made on the question as to whether we have power to direct an appraisal. Under these circumstances we think we should leave the question open and, while expressing the opinion that an appraisal should be made, merely say that precise findings as to values must be made." [R. 380.]

Petitioners seize upon this language as a ruling "that in every 77B reorganization there must be a minute appraisal to ascertain the precise value of the properties involved.

The Circuit Court of Appeals did not so hold.

In filing objections to the plan respondent prayed that an impartial and qualified appraiser be appointed to appraise all properties of Union and Consumers [R. 107]. At the opening of the hearing before the Special Master he moved that an appraisal be made of the properties securing the Union bonds, the properties securing the Consumers bonds and the properties proposed to be contributed to the new corporation by Consolidated [R. 271]. Decision was deferred until completion of the testimony. At that time respondent renewed his motion and it was taken under

submission [R. 272], but denied by the Special Master's findings and report, reading in part as follows:

"... The evidence developed that there has been such a commingling of the assets and properties, including the funds from the sale of stock of Consolidated, that an appraisal of the properties would be of no value to the court and would be of such indefinite and unsatisfactory nature as to produce further confusion, and a separate, independent appraisal would result in unnecessary and great delay and expense to all parties. Its benefits would be highly problematical." [R. 158.]

Respondent's exception to this ruling of the Special Master [R. 199-200] was denied. On appeal respondent assigned as error the failure of the District Court to evaluate the interests of the respective parties to the plan and the denial by the District Court of respondent's exception to the report of the Special Master with respect to appraisal [R. 331, 337-339].

It is not the contention of respondent that a formal appraisal must be had in every case under §77B. He has, however, contended that under the circumstances of this case an appraisal should have been directed. The Circuit Court of Appeals pointed out the inconsistency of the findings below, saying:

"It has been found that the assets have been so commingled that identification thereof is impossible, yet findings are made to the effect that assets subject to the trust indentures are insufficient to pay the principal of and interest on the bonds." [R. 374.]

The same inconsistency runs throughout the case. Respondent's motion for appraisal was opposed upon the ground that the assets of the various companies had been so commingled that segregation and appraisal were impossible. Yet the officers of Consolidated, Mr. Mitchell and Mr. Gautier, later appeared and seemed to have no difficulty in testifying to the value of the various properties. Their testimony is unsatisfactory when compared with the balance sheets of Consolidated filed with the court. The balance sheet as of September 30, 1937, shows liabilities of the united enterprise exceeding assets by \$570,597.08. The balance sheet as of June 30, 1938 [R. 316], shows insolvency to the extent of \$529,486.26. Mr. Mitchell and Mr. Gautier were the only witnesses before the court on the important question of the value of the assets of Consolidated—the company of which they were in active charge.

Before the Special Master there was evidence that in 1929 on appraisal by J. G. White Engineering Corporation the value of the Union and Consumers assets was placed at \$15,000,000 [R. 281]. An appraisal by Consolidated in 1931 placed the value of all properties at \$4,414,425 [R. 281]. The consolidated balance sheets of Consolidated and

³It cannot be contended that the burden of establishing the value of the properties involved should be borne by dissenting creditors. In *First National Bank v. Flershem*, 290 U. S. 504, at 525 and 526, this Court said:

[&]quot;In receivership proceedings, as was held in National Surety Co. v. Coriell, 289 U. S. 426, 436, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information, where the jurisdiction rests wholly upon the consent of the defendant who joins in the prayers for relief. It would be unconscionable to impose upon a few dissenting creditors the heavy financial burden of making adequate appraisal, supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states."

its subsidiaries referred to above showed liabilities exceeding assets. Adding to the confusion was the conflicting testimony of the three witnesses who testified to value. It is difficult to understand how the Special Master concluded under these circumstances that an independent appraisal by a competent court appraiser would not have aided him in finding his way out of the maze of conflicting figures.

More certainty with respect to the value of the properties of the various companies here involved is essential to that informed and independent judgment required in proceedings such as these.

> Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 115;

First Nat. Bank v. Flershem, 290 U. S. 504, 525; National Surety Co. v. Coriell, 289 U. S. 426, 436.

Seemingly, the Special Master and the District Court considered the past history of Consolidated and its subsidiaries of greater importance to a determination of fairness than the present value of the properties involved in the plan. . This is shown in the failure of the Special Master to make separate findings as to the Union and Consumers properties, although objection to the plan was made upon the ground, among others, that as between Union and Consumers bondholders the plan discriminated in favor of the latter [R. 101]. It is plain that the application of the full priority rule requires reasonably accurate determination as to the value of properties against which creditors are entitled to full priority. The decision of the Circuit Court of Appeals, while suggesting the advisability of appraisal under the circumstances of this particular case, does no more than insist upon such determination.

POINT-III.

The Elimination of the Present Union and Consumers Bonds.

Petitioners attack the decision of the Circuit Court of Appeals as ruling that the plan in the instant case is unfair in providing for the substitution of a common issue of bonds for the present Union and Consumers bonds. his brief in opposition to certiorari herein respondent has fully stated his position on this point.' The decision of the Circuit Court of Appeals, as respondent reads it, declares the plan herein to be unfair simply because it fails to accord full priority to bondholders of the subsidiaries to the extent of their debts. While there is some uncertainty in the language of the court when the decision is read piecemeal, such uncertainty disappears when it is considered in its entirety. The point is one which might be of some importance to Union and Consumers bondholders, but it is seized upon here by petitioners despite the fact that it in no way involves the question of the fairness of the plan as between bondholders and the stockholders of Consolidated.

Following after a discussion of the full priority rule as reaffirmed in Case v. Los Angeles Lumber Products Co., Ltd., supra, the decision of the Circuit Court of Appeals states the basis of the finding that the plan here involved is unfair in the following language:

"It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, vet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., supra. Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan; some of which appear to be sound." [R. 377.] (Italics ours.)

Petitioners here, as well as the petitioners in Docket No. 444, interpret the quoted language, particularly because of the words italicized by respondent, as holding that the full priority rule is violated by the cross-participation of the two groups of bondholders in the properties securing their respective bonds. The italicized words create some uncertainty, but petitioners' strained interpretation of the decision is shown by the obvious import of the opening and closing sentences of the quoted paragraph.

Respondent considers the italicized words unfortunate and unnecessary. It is his position that if the decision is properly interpreted by petitioners here and by the petitioners in Docket No. 444, then the decision should be corrected on the authority of the cases cited by the two groups of petitioners. Such correction, however, need not affect the primary issue of fairness, for the plan's invasion of the bondholders' rights for the benefit of stockholders is the paramount consideration.

POINT IV.

The Plan Is Unfair.

1. FAIRNESS OF THE PLAN MUST BE DETERMINED BY APPLICATION OF THE RULE OF FULL OR ABSOLUTE PRIORITY OF CREDITORS.

In seeking review by this Court on certiorari the principal contention of petitioners was that the full or absolute priority rule of Case v. Los Angeles Lumber Products Co., Ltd., supra, and of the earlier equity reorganization decisions of this Court, could have no application to the instant case. They argued that the rule is applicable only to reorganization of insolvent corporations, and that since the Special Master in the instant case had found the united enterprise—Consolidated considered collectively with its two subsidiaries, Union and Consumers—to be solvent, the absolute priority rule could not be applied.

Apparently petitioners have abandoned this theory. However, they still insist that the facts of the *Lumber Company* case differ so radically from those presented on this review that the decision cannot serve as controlling authority.

A considerable portion of their brief is devoted to compilations of figures to establish the solvency of the united enterprise, and of both Union and Consumers as well. Petitioners, however, present no reasoning, nor cite any authority, for exempting solvent corporations in reorganization from the full priority rule of the Lumber Company case.

The facts of the two cases may differ in some respects, but the governing principles are the same. Respondent does not believe that at this late date it will be seriously

questioned that in all reorganizations under §77B of the Bankruptcy Act our courts must be guided by the "fixed principle" of Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, reaffirmed in Kansas City Terminal Railway Co. v. © Central Union Trust Co., 271 U. S. 445, that

"to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation."

This language merely rephrases the "familiar rule" reaffirmed by this Court in Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co., 174 U. S. 674, that

"the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors."

Today it is firmly established by the decisions of this Court, to use the language of In re New York Railways Corporation, 82 Fed. (2d) 739, 742, that

"stock equity may not be allowed to participate in any plan of reorganization which does not first provide for making creditors whole."

The same logic which requires the application of these rules to insolvent corporations requires their application to solvent corporations. In either case, in the language of this Court in Kansas City Terminal Ry. Co. v. Central Union Trust Co., supra,

"any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights * * * of creditors comes within judicial denunciation." The plan need only be examined in the light of these controlling principles, so recently reaffirmed by this Court in Case v. Los Angeles Lumber Products, Lad., supra.

2. THE DISREGARD OF THE FULL PRIORITY RULE.

Viewed against the factual background of the case it is evident that the plan is unfair to Union and Consumers bondholders in the following respects:

- (a) Despite the fact that the principal of presently outstanding bonds is secured 100%, Union and Consumers bondholders are compelled to accept non-cumulative preferred stock in substitution for 50% of the principal amount of the bonds now held by them.
- (b) Accrued and unpaid interest on outstanding bonds, amounting to \$625,270, is cancelled although the bondholders now have a first lien on assets of such value that a minimum of \$286,000 remains to be applied in payment of accrued interest after full provision for the principal of the bonds.
- (c) Cancellation of inter-company obligations results in discharge of indebtedness owing by Consolidated to Union and Consumers in excess of \$5,000,000. Such indebtedness constitutes an asset against which the bondholders, as creditors of Union and Consumers, are entitled to full priority over stockholders of Consolidated. Should it be paid, even in small part, Union and Consumers would be able to discharge the small balance of accrued interest which would remain after application to their bonds of the assets admittedly covered by their respective trust indentures.

- (d) The new income bonds to be substituted for 50% of the principal amount of present bonds will bear interest at the rate of 5% as compared to the 6% rate now stipulated. No default under the indenture will occur, however, unless during the first two years the interest paid does not aggregate 4%, or an average of 2% per annum, or unless during the first five years the interest paid does not aggregate 16%, or an average of 3.2% per annum [R. 42]. Even if the full 5% interest on the new bonds is paid regularly the interest income of present Union and Consumers bondholders will be but $41\frac{2}{3}$ % of the interest income to which they are entitled on their present bonds.
- (e) Bondholders are compelled to extend the time for payment of their bonds to April 1, 1957.
- (f) Present preferred stockholders of Consolidated, without payment of any consideration and without sacrifice on their part, preserve their present equity position despite the sacrifices exacted of Union and Consumers bondholders.

The leniency of the default provisions with respect to the new bonds is striking. If on April 1, 1939, interest aggregating 4%, or 2% per annum, has been paid during the preceding two years, the new corporation need pay no interest during the next three years ending April 1, 1942. At that date, not having paid the required aggregate of 16% during the preceding five years, the corporation will be in default. But bondholders will have no right to foreclose, for no right of foreclosure "shall accrue until the expiration of two years after the occurrence of any such event of default, and then only if such event of default shall not have been remedied" [R. 43]. Before the expiration of the five-year period the new corporation need only pay the delinquent required interest to cure the default.

- (g) Present common stockholders of Consolidated, having no equity whatever, are granted the right to acquire common stock of the new corporation at a price of \$1.00 per share, while the same stock is subject to purchase by Union and Consumers bondholders only at prices graduating from \$2.00 to \$6.00 per share.
 - PROPERTY RIGHTS OF THE BONDHOLDERS FOR THE BENEFIT OF STOCKHOLDERS OF CONSOLIDATED.

Every step of the plan in its treatment of Union and Consumers bendholders constitutes a definite invasion of their property rights.

Louisville Joint Stock Bank v. Radford, 295 U. S. 555.

Full priority to the extent of their debts against the assets of their debtors is denied them. One-half of bond principal, now secured 100%, is taken from the bondholders to be replaced by non-cumulative preferred stock; accrued interest amounting to \$625,270, which is secured in part, if not in whole, is arbitrarily cancelled: interest income is reduced and the time for payment of the bonds extended. Such treatment might be justified if the security for the bonds had shrunk to a point where the bondholders could have no reasonable anticipation of payment therefrom. Here, however, the situation is entirely different, for the assets of Union and Consumers admittedly subject to their trust indentures are almost sufficient to discharge the full interest and principal on the bonds, and Consolidated is indebted to the subsidiaries to an extent which would insure full payment.

The disregard of the full priority rule is climaxed by the plan's cancellation of this indebtedness.

Each step of the plan confiscates the property rights of the bondholders; each step improves the position of the present preferred stockholders of Consolidated in their succession to the common stock of the new corporation; each step enhances the value of the stock equity and insures control of the new corporation by the present stockholders of Consolidated.

For the sacrifices exacted of them the plan offers the bondholders no compensation. Not even one share of the common stock of the new corporation is given them by way of compensatory treatment. While present preferred stockholders of Consolidated receive 285,947 shares of the new common stock because of transfer by Consolidated to the new corporation of its assets, found by the Special Master to be worth \$1,000,000,5 present bondholders receive not one share to compensate them for the cancellation of accrued interest of \$625,270.

The preferred stockholders of Consolidated exchange their present stock, share for share, for the common stock of the new corporation. No contribution or sacrifice of any kind is demanded of them. Today they own all equit in the united enterprise under the lien of the bonds; the plan preserves in them that same equity, but enhanced

⁵The figure of \$1,000,000. includes an astronomical figure of \$500,000. for good will. Consolidated has been operating since 1929, yet in no year since its organization, except 1929, has it shown net earnings available for dividends, after payment of or provision for all charges fR. 190-191]. The valuation of \$500,000. placed on good will by the witness Mr. Mitchell is in excess of the total net operating profit of the company, before bond interest and provision for depreciation, depletion, amortization and like charges for the four-year period, 1934-1937, inclusive [R. 190].

in value by the sacrifices exacted of present bondholders. Everything which is taken from the bondholders inures to the benefit of the present stockholders; they benefit in direct proportion as the bonded indebtedness is repudiated and the property rights of the bondholders confiscated.

In final analysis, the plan is simply an arrangement of the parties by which the subordinate rights and interests of stockholders are enhanced at the expense of the prior rights of the bondholders.

The proponents of the plan have sought to justify it on the grounds that (1) Consolidated is cancelling Union and Consumers bonds held by it in the principal amount of \$166,000; (2) present bondholders receive stock purchase warrants entitling them to purchase common stock of the new corporation; and (3) Consolidated is contributing to the new corporation its allegedly free assets.

. No justification for the plan can be found in the cancellation of the \$166,000 of Union and Consumers bonds. As noted in considering the indebtedness of Consolidated under the operating agreement, that corporation is indebted to the subsidiaries in an amount many times greater than the face amount of bonds held by Consolidated. Even disregarding the \$5,000,000 indebtedness of Consolidated resulting from depreciation and depletion of the Union and Consumers properties, Consolidated is indebted to the subsidiaries on current account transactions in the sum of \$842,710.18. The subsidiaries are indebted to Consolidated on current account transactions only to the extent of \$586,111.62. Offsetting, and allowing for the \$166,000 of Union and Consumers bonds, Consolidated still remains liable on the current account item alone in the sum of \$90,598.56 [R. 316].

Nor can the plan's treatment of the bondholders be justified by the fact that the new preferred stock to be issued will carry stock purchase warrants entitling present bondholders to purchase two shares of the common stock of the new corporation for each share of the new preferred. The warrants have only a highly speculative, if any, value. They are but an invitation to bondholders to · make further investment in the enterprise, and in no sense can they be considered as affording compensatory treatment to bondholders for loss of their accrued interest or for their change from a creditor to a stockholder position. In its brief as amicus curiae on rehearing before the Circuit Court of Appeals the Securities and Exchange Commission ably demonstrated that to make the bondholders whole for accrued interest clone, the new common stock will have to attain a value of from \$12.40 per share (if the warrants are exercised within the first six months) to \$16.40 per share (if the warrants are exercised during the fifth year after issuance). It further pointed out that if the warrants to be issued under the plan to present common stockholders of Consolidated are also exercised in full, a market value for the new common shares of between \$5,281,474 and \$6,984,346 will have to be justified. This is approximately five times the present value of the equity in the united enterprise asserted by petitioners in their brief.

The plan's discrimination in favor of the stockholders of Consolidated is strikingly shown in the treatment of present common stockholders who have no equity whatever. There are 397,455 common shares now outstanding. Under the plan stock purchase warrants will be issued to common stockholders permitting them to purchase one share of the new common stock for each five shares now

held, at a price of \$1.00. If such warrants are exercised within the three months' period allowed, present common stockholders, for an investment of \$79,491, will receive 79,491 shares of the new common stock. If present bondholders exercise their warrants within the first six months, they will be entitled to purchase a total of 60,280 shares of the new common stock at \$2.00 per share, or a total of \$120,560.00.

Thus it is seen that not only are present preferred stockholders of Consolidated preferred over the bondholders, but so too are common stockholders who have no right whatever to participate in the plan.

Case v. Los Angeles Lumber Products Co., Ltd., supra;

In re 620 Church Street Bldg. Corp., 299 U. S. 24.

The fact that Consolidated will transfer its assets to the new corporation likewise fails to justify the plan. These assets are already in the united enterprise; already they are indirectly charged with liability for payment of existing Union and Consumers bonds because of the huge indebtedness of Consolidated to the subsidiaries. Consequently transfer of these assets is in reality made by, the bondholders to the extent that the plan does not make them whole. But even if we assume that these are free assets, their transfer to the new corporation affords no compensatory treatment to bondholders. No benefit will flow to bondholders by reason of the transfer, and the present preferred stockholders of Consolidated will continue their present indirect ownership of the assets. That ownership today is evidenced by preferred stock

of Consolidated; if the reorganization is consummated it will be evidenced by new common stock; the change is one of form and not of substance.

It will be urged that the assets of Consolidated will be subjected to the lien of the new bonds. The present bonds are secured 100% as to principal. The new issue will be more than 50% less in principal amount than the present issues. Consequently the new bonds will have a two to one security entirely independent of the allegedly free assets of Consolidated. Additional security is not required, and to offer the assets of Consolidated for such purpose is a mere gesture.

Thus the considerations relied upon by petitioners as supporting the plan afford no real compensation to bondholders for their drastic treatment under the plan.

The foregoing discussion shows that in this plan of reorganization the full priority rule of Case v. Los Angeles Lumber Products Co., Ltd., supra, and the earlier reorganization decisions of this Court, is entirely disregarded. The plan here simply contemplates the scaling down of corporate debts without compensatory treatment. It was not the purpose of Section 77B to permit a corporate debtor to shed its debts and to improve its position at the expense of its creditors.

Yet that is exactly what is accomplished by the plan here involved.

⁶The aggregate principal amount of the Union and Consumers bonds now outstanding is \$3,180,000., this figure including the \$166,000. of bonds held by Consolidated. The aggregate principal amount of the new bonds to be issued under the plan is 1,507,000.

Aside from the problem of bonded indebtedness, Consolidated and its subsidiaries are in good financial condition [R. 312]. Annual interest on outstanding bonds publicly owned amounts to \$180,840 [R. 191-192]. In 1936 the operating profit of Consolidated, before bond interest and reserves for depreciation, depletion and amortization, amounted to \$201,632.29, or over \$20,000 in excess of interest requirements on present bonds. Again in the first nine months of 1937 alone, an operating profit of \$199,890.82 was made. This amount covered interest requirements for the full year, with a surplus over, and with fourth quarter income not reported [R. 190]. Even more striking is the earnings record for the first five months of 1938 ending June 30th [R. 315]. In these five months the operations of Consolidated and its wholly owned subsidiaries returned a consolidated net profit of \$25,255 after full provision for current interest and for depletion, depreciation and amortization [R. 315, 312]. These facts further demonstrate the essential unfairness of the plan to present bondholders.7

Respondent submits that the plan here must meet with judicial denunciation under the definite rules reaffirmed by this Court in Case v. Los Angeles Lumber Products Co., Ltd., supra. In the lower courts somewhat similar plans have been rejected under analogous conditions.

The hearing before the Special Master was concluded November 17, 1937. The order of the District Court confirming the plan of reorganization was not filed until September 8, 1938. Shortly prior to August 1, 1938, respondent moved the court to reopen the hearing in order that the changed condition of Consolidated and its wholly owned subsidiaries reflected in the balance sheets as of June 30, 1938, might be considered. The motion to reopen was denied [R. 312].

In In re Day & Myer, Murray & Young, Inc., 2 Cir. 93 Fed. 657, the reduction of bonded indebtedness by one half was condemned when the evidence showed the value of the mortgaged property to exceed the principal of the bonded indebtedness. In that case, as well as In re Barclay Corporation, 2 Cir., 90 Fed. (2d) 595, the cancellation of accrued interest to build up an equity for junior interests was also condemned.

The lower courts have repeatedly rejected plans which, as here, discriminate unfairly in favor of the stockholders and disregard the prior rights of bondholders. Typical of such cases are Sophian, et al. v. Congress Realty Co., 8 Cir., 98 Fed. (2d) 499; Wayne United Gas Co. v. Owens-Illinois Glass Co., 4 Cir., 91 Fed. (2d) 827; Price'v. Spokane Silver & Lead Co., 8 Cir., 97 (2d) 237.

Here, as previously stated, the vice of the plan is found in its appropriation of the properties against which bondholders are entitled to full priority, and transfer of such properties, in effect, to stockholders.

The closing language of the decision of this Court in Louisville Joint Stock Land Bank v. Radford, supra, seems peculiarly appropriate. We quote from pages 601 and 602 of the decision, as follows:

"The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the bank, without compensation, and given to Radford, rights in specific property which are of substantial value.

As we conclude that the Act as applied has done so, we must hold it void.

For the Fifth Amendment commands that, however great the Nation's need, private property shall not. be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

In the cited case only an individual mortgagor and an individual mortgagee were involved; but the rule which there protected the individual mortgagee must here with equal force protect the Union and Consumers bondholders, as a collective group of mortgagees, from confiscation of their property rights for the benefit of stockholders of Consolidated, as a collective group of mortgagors.

4. THE PLAN AS BETWEEN UNION AND CONSUMERS BONDHOLDERS IS UNFAIR TO THE FORMER.

Not only is the plan unfair to both Union and Consumers bondholders, but it is particularly unfair to the former.

The plan provides for new Series U bonds in the amount of \$938,500 and new Series C bonds in the amount of \$568,500, the former for Union bondholders, the latter for Consumers bondholders [R. 27]. Income is to be divided equally between the two series, and upon their retirement, between the two corresponding series

of preferred stock [R. 33-34; 47]. It is apparent that this favors Consumers bondholders over Union bondholders.

The proponents of the plan attempt to justify this discrimination by showing that under the management of Consolidated the Consumers properties have for some years past been so operated as to contribute a greater proportion of the income of the united enterprise than the Union properties [R. 289]: The criterion is a false one, for Consumers' larger contribution to income is the result of a business policy dictated by circumstances which disclose the essential strength of Union and the essential weakness of Consumers. The situation was well presented during the course of these proceedings by a letter from Mr. Mitchell, then secretary of Consolidated, sent by order of its board of directors to all Consumers bondholders on June 4, 1936 [R. 303-311]. Explaining the reason why Consumers plants were contributing more to the income of the joint operation than Union, Mr. Mitchell said:

"When the volume of business was continually decreasing it became necessary to temporarily abandon certain plants and concentrate operations in others. Statements may have been made to you that the Consumers plants have been operated and kept up continuously while the Union had not, and that the reason for so doing was that the Consumers plants were more valuable. It is true that more of the major plants of Consumers were operating. However, the reason is simple and sound. The major Consumers plants, with one exception, are on leased properties which require the payment of large mini-

mum rents and royalties. Many of the Union plants are on property owned in fee where the only carrying charges are taxes. Obviously the Consumers plants—where minimum royalties had to be paid were the ones to be operated. This was done and accounts for the fact that during the bottom of the depression the Consumers plants were more actively in operation and sold more tonnage than the Union. With the upturn in business, which started in the middle of 1935 and has since continued, Union plants are now being revamped and placed in active operation. In the past three months two of these have been completely overhauled and are now actively operating. The operation of the Consumers plants during the low period did not impair your security. There is sufficient rock, sand and gravel on these properties to last indefinitely. The plants have been well maintained and it is indisputable that they could' not have all been maintained and operated had Consumers not been a part of Consolidated [306]."

The foregoing statement demonstrates the falsity of the criterion used in the allocation of the income of the new corporation under the plan—one-half to Union and one-half to Consumers.

We have previously noted that the Special Master for some reason did not value the Union and Consumers properties separately. The testimony of witnesses to value, however, has been tabulated above (*supra*, p. 9).

From the tabulation it is seen that the valuation most favorable to Consumers in relation to Union, that of Mr.

Gautier, shows Union assets worth \$504,000 more than those of Consumers. The valuation most favorable to Union, that of Mr. Rogers, shows its properties worth \$1,768,000 more than Consumers. The third valuation, by Mr. Mitchell, shows Union worth \$883,100 more than Consumers.

In the face of the much greater value of the Union assets and of the much greater Series U bonds to be serviced, income ander the plan is to be equally divided.

This discrimination against Union in allocation of income is visually presented by the table showing the respective contributions of Union and Consumers to the new corporation proposed by the plan [R. 285]. Union contributes almost twice as much acreage devoted to plants, approximately eight times the acreage devoted to bunkers, and approximately five times as much non-operative acreage. And while most Union acreage is owned in fee, by far the greater part of Consumers acreage consists of leaseholds.

The proposed income division in the face of this evidence cannot be justified by the results of a depression business policy. Had the operations of Consolidated during the depression decreased so that the leased properties of Consumers could have supplied all demand without operation of any Union plants, then Union, judged by the criterion of income division of the plan, would be entitled to nothing.

The unfairness to Union bondholders is apparent.

Conclusion.

In closing their brief the petitioners urge that the plan in the instant case should be confirmed because (1) the present plan was formulated after long delay and strenuous effort; (2) the \$7,000,000 investment made in 1929 by the present stockholders of Consolidated has not proved a profitable one; and (3) respondent, who alone appealed from the judgment of the District Court, purchased his bonds at depression prices and is therefore a "speculator". Such considerations, respondent submits, are foreign to a determination of whether the plan is fair and equitable. But in passing it should be noticed that of the \$7,000,000 invested by the stockholders of Consolidated in 1929, only \$500,000 went into the corporation by way of new working capital [R. 279]. This figure is in striking contrast to the cash of \$380,000 and receivables of \$750,000 which Consolidated took over from Union and Consumers upon the inception of the unified operation [R. 139].

In his brief in opposition to certiorari herein respondent presented his status as an objector to the plan. There it was shown that prior to the filing of these proceedings he had become the owner of \$72,000 of his Union bonds and of all his \$31,500 of Consumers bonds. In no sense has he been a speculator in the bonds or an obstructionist in these proceedings. What he paid for his bonds makes this plan neither fair nor unfair; in any case he is entitled to nothing more than a fair plan. He has opposed this plan as patently unfair to the bondholders and unfairly

discriminatory in favor of the stockholders of Consolidated. That opposition has been made in good faith and without the use of anything even slightly suggestive of obstructionist tactics.

Respondent respectfully submits that the decision of the Circuit Court of Appeals is correct and should stand.

Respectfully submitted,

KENNETH E. GRANT,

Attorney for Respondent.

MOTT AND GRANT,
JOHN G. MOTT,
HOWARD A. GRANT,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No.

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,

UNION ROCK COMPANY, a corporation,

Subsidiary,

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,

F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; and W.M. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee; . Petitioners.

E. BLOIS DU BOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

In the Matter of

CONSOLIDATED ROCK PRODUCTS Co., a. Delaware corporation,

Debtor.

·Union Rock Company, a corporation,

Subsidiary,

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,

Subsidiary.

F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; and WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee,

Petitioners.

E. Bloss Du Bois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners herein are the members of two bondholders' committees, and were appellees in the Court below. The other appellees below have heretofore filed in this Court their petition for certiorari in this case, being Docket Number 400 in the files thereof. Petitioners pray that a writ of certiorari issue to review the judgment and decision of the United States Circuit Court of Appeals for the Ninth Circuit entered on June 19, 1940 [R. 365-380, 381] adjudging certain features of a proposed plan of reorganization under Section 77B of the Bankruptcy Act unfair and inequitable, and reversing the judgment of the trial court approving said plan.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 19, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) and Section 24 of the Bankruptcy Act (11 U. S. C. A. 47).

¹F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee, and Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee.

²Consolidated Rock Products Co., a corporation, and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co.

³Record references throughout are to the printed record filed with Petition for Certiorari in Docket Number 400.

Statute Involved.

The statute involved is Section 77B (f), of the Bank-ruptcy Act (11 U. S. C. A. 207f), the pertinent portion of which is as follows:

"After hearing such objections as may be made to the plan the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors orstockholders, and is feasible * * *."

Question Presented.

Where there are outstanding two issues of bonds, each secured by a separate mortgage on particular properties and where the two properties have been operated as one for many years, resulting in a commingling thereof, may a reorganization plan, under Section 77B, properly provide for supplanting the bonds of both issues with one issue of bonds secured by all of the mortgaged property formerly securing the respective issues?

Statement of Facts.

The facts found by the Circuit Court of Appeals material to the question involved herein, are as follows [R. 365-380]:

Union Rock Company (hereinafter called "Union"), Consumers Rock & Gravel Company (hereinafter called "Consumers") and Reliance Rock Company (hereinafter called "Reliance") were corporations engaged in the business of mining, processing, shipping and selling rock and

gravel. Union owned all the outstanding stock of Reliance. Union and Consumers had each issued first mortgage bonds secured by certain properties of the respective In 1929, Consolidated Rock Products Co. companies. (hereinafter called "Debtor") was organized. It issued its preferred and common stock to the public for cash. Part of the proceeds was used to acquire all of the outstanding capital stock of Union and Consumers; part was used for operating capital. In the same year Debtor entered into an agreement with Union and Consumers whereby it agreed to operate the properties of said companies and to meet payments of principal and interest on the bonds of said companies. Thereafter, Debtor operated the properties as a unit and in the course of such operations the properties of Union, Consumers and Reliance and replacements of such properties became commingled.

On March 1, 1934, default occurred in the payment of interest due on the Union bonds. On July 1, 1934, a similar default occurred with respect to the Consumers bonds. On May 24, 1935, Debtor, Union and Consumers filed a petition to reorganize under the provisions of Section 77B of the Bankruptcy Act. On April 28, 1937, the petition submitting the plan of reorganization was filed. DuBois, a bondholder, filed objections.

Among other things the plan provided for the organization of a new corporation; the transfer to it of the properties of Union, Rehance, Consolidated and Debtor free of any claims; and the issuance by the new corporation of new bonds secured by all the property of the corporation. New bonds in the principal amount of \$938,500 (being 50% of the principal amount of the outstanding Union bonds) were to go to Union bondholders and new bonds in the principal amount of \$568,500 (being 50% of the principal amount of the outstanding Consumers bonds) were to go to Consumers bondholders; new preferred stock was to be issued to both Union and Consumer bondholders; new common stock was to be issued to Debtor's preferred stockholders; new common stock purchase warrants were to be issued to the Debtor's common stockholders.

The plan was referred to a special master. He found that the value of the assets admittedly subject to the Union and Consumers mortgages "is insufficient to pay the par value of the bonds, plus accrued interest." He further found that it was to the bondholders' interest to operate the properties as a unit and recommended approval of the plan of reorganization. The District Court adopted said findings and approved the plan as fair and equitable. DuBois, a bondholder, appealed.

Upon appeal, the Circuit Court of Appeals, saying that it was acting upon the authority of Case v. Los Angeles Lumber Products Co., 308 U. S. 106, adjudged unfair two provisions of the proposed plan:

- (1) The provision for the issuance of a single issue of bonds secured by the properties of Union, Reliance, Consumers and the Debtor.
- (2) The provision for the issuance of con ion stock to the preferred stockholders.

The court found it unnecessary to consider other provisions of the plan, held the plan unfair and reversed the judgment of the trial court approving the plan.

This petition is filed for the purpose of seeking a review of adjudication (1) above, not for the purpose of seeking a review of adjudication (2).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in adjudging that even though the mortgaged properties of two corporations have been commingled and operated for years as a unit, a plan of reorganization is unfair if it provides for one issue of bonds, issued in such amounts to the bondholders of the respective corporations as would give them security equivalent to the security they would have had if the plan had provided for two issues of bonds each secured by the properties of each respective company.

Reasons for Granting the Writ.

The Circuit Court of Appeals has decided an important question of law which has not been but should be settled by this Court.

In many ventures of magnitude, notably in the case of railroads, properties subject to one mortgage become intermingled with properties subject to other mortgages and all of such properties over a period of many years, are operated as a unit. Reorganization of such properties, beneficial to the bondholders, often cannot be effected unless a single issue of bonds replaces the numerous ones

of Appeals erroneously, as we contend, would make impossible plans of reorganization embracing such procedure. This question is not considered in Case v. Los Angeles Lumber Products Co. (supra) and has not been settled.

The settlement of this question is important to petitioners. So long as the adjudication of the Circuit Court of Appeals stands, it will be impossible to secure approval by the trial court of a plan which provides for a single issue of bonds. Such a plan may be the only practicable way to reorganize, these corporations. To propose a plan in the teeth of said adjudication, in the hope that this Court might ultimately review a decision rejecting it will be impractical in view of the inevitable expense of working out the plan and delays incident thereto and to the appeals which would have to be prosecuted.

The settlement of the question is important to bond-holders and corporations wherever several corporations (parents or subsidiaries, or both) have respectively issued bonds and desire to reorganize under the Bankruptcy Act as one consolidated corporation, issuing one issue of bonds to replace the several respective issues of the constituent corporations or wherever one corporation, which has operated its entire properties as a unit, has two or more bond issues outstanding, each secured by a different part of its properties.

Argument.

In adjudging unfair the provision for the single issue of bonds to replace the bonds issued by Union and Consumers, the Circuit Court of Appeals said:

"It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan, some of which appear to be [R. 377.] sound."

We do not in this petition attack the correctness of the conclusion that in view of Case v. Los Angeles Lumber Products Co. (supra), the Debtor's preferred stockholders are not entitled to any interest in the properties. We ad-

one issue of bonds secured by both Union and Consumers properties (and also by properties of Debtor) and divide the bonds equitably between Union and Consumers bond-holders.

In many cases feasibility may require that unified operations be continued and that creditors secured by different parts of a unified system shall receive identical securities. In such cases, each class of lienholders may be compensated for the loss of its exclusive lien by the acquisition of a partial interest in other property. There is nothing in Case v. Los Angeles Lumber Co. which supports the decision of the Circuit Court of Appeals that this cannot be That case dealt with a single issue of bonds, all secured by the same property, and did not involve two issues secured by different properties. A frequent feature. of railroad reorganizations is the elimination of divisional mortgages by substituting a new security issuable to the holders of the several divisional bond issues. Unless the decision of the Circuit Court of Appeals on this matter is reversed, it may seriously interfere with railroad as well as with other reorganizations.

As an instance of this practice in railroad reorganizations, the attention of the Court is directed to the case of Jameson v. Guaranty Trust Co. of New York, 20 Fed. (2d) 808 (C. C. A. 7th, 1927), certiorari denied 275 U. S. 569 (1927). The reorganization plan there proposed in an equity receivership provided that the holders of two outstanding bond issues, each of which was secured by a par-

pate equally in two new bond issues, a first and a second both secured by mortgages covering all of the property which the old issues had previously been separately secured. The order of the District Court approving the plan was affirmed by the Circuit Court of Appeals over the objection that the plan discriminated unfairly in favor the holders of one of the old bond issues.

More recently, acting under Section 77 of the Barruptcy Act (11 U. S. C. A. §205), the Interstate Comerce Commission has approved two plans of reorganization for railroads in which divisional liens were eliminated and the lienors were given general system securities of same class in lieu thereof. Missouri Pacific Reorganization, 239 I. C. C. 7 (Jan. 10, 1940, modified on a different point, April 9, 1940); Chicago & Northwestern Reorganization, 236 I. C. C. 575 (Dec. 12, 1939). It should noted that the Commission may approve a plan only if the Commission's opinion it

"is fair and equitable, affords due recognition to rights of each class of creditors and stockholded does not discriminate unfairly in favor of any classification of stockholders, and will conform to requirements of the law of the land regarding participation of the various classes of creditors a stockholders,"

as required by subdivision (e) of Section 77. It shows be noted, moreover, that both reports were rendered af the decision of this Court in Case v. Los Angeles Lumb Co.

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Where unified operations are desirable, or where the respective assets securing two or more bond issues have been intermingled, a reorganization plan under Section 77B may properly provide for supplanting the bonds separately secured with new securities which are general in character. For example, in the 77B reorganization involved in *In re United Railways & Electric Co.*, 11 Fed. Supp. 717 (D. C. Md., 1935), nine different mortgages with their respective securities (most of which were divisional bonds) were supplanted by the issue of debentures and preferred stock, the Court stating (at p. 720):

"There had been outstanding for many years 12 issues of securities, constituting the capitalization of the company. Of these, five were divisional bonds, and two were Maryland Electric Company bonds, which were substantially divisional bonds. Each one of these divisional bonds covered a railway which was originally an independent unit, a self-contained railway, but through the later consolidations this independent character was completely destroyed. The identity of the respective assets of each railway beeame lost and, therefore, it became absolutely essential to disregard the various divisions in the present reorganization, in so far as different securities were concerned, and simply to proportion, as nearly as possible, the actual values that now adhere to the respective parts, as represented by the old securities. Thus, under the reorganization, nine different mortgages with their respective securities have been supplanted by the issue of (1) debentures and (2) preferred stock."

Conclusion.

The question here raised is one of great public importance. So long as the holders of bonds of each of several issues are given bonds of a single issue, secured by all of the properties securing the respective original issues, in such amounts as give these bondholders the equivalent of their right to full priority against the assets securing their old bonds, there is nothing inherently unfair in a plan which so provides. The adjudication of the Circuit Court of Appeals condemns such plans of reorganization. It is respectfully submitted that this petition to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

Paul Fussell,
Homer L. Mitchell,
Graham L. Sterling, Jr.,
W. B. Carman, Jr.,

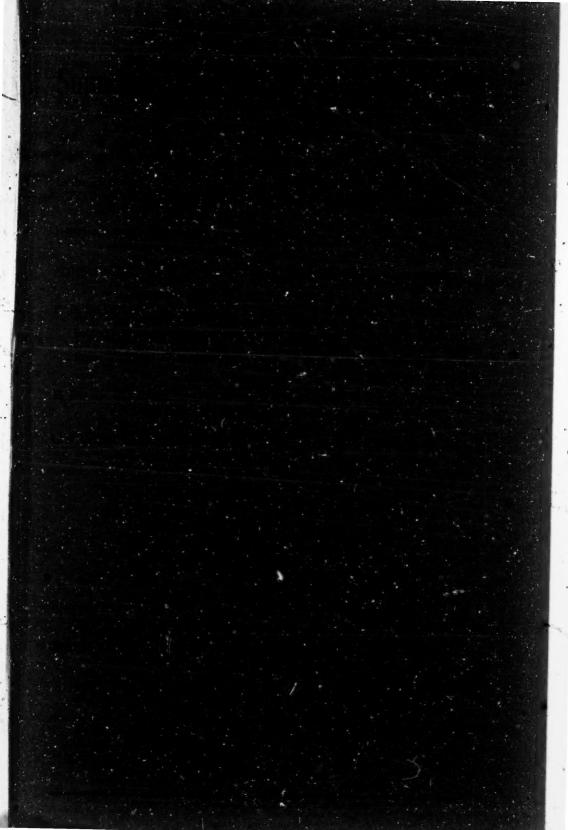
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Supreme Court of the United States

October Term, 1940. No. 444.

In the Matter of
CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,
Debtor,

UNION ROCK COMPANY, a corporation,

Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,
Subsidiary.

F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; and WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee, Petitioners.

E BLOIS DU BOIS,

Respondent.

BRIEF FOR PETITIONERS.

Statement of Facts and Outline of Proceedings Below.

Consolidated Rock Products Co. (hereinafter called "Consolidated") has no outstanding securities except preferred and common stock. This stock was sold publicly in 1929 and most of the proceeds used to purchase all of the outstanding stocks of Consumers Rock & Gravel Company, Inc. (hereinafter called "Consumers"), and Union

Rock Company (hereinafter called "Union"). Prior thereto Consumers and Union had been separate, competing, independently owned and operated, and unaffiliated companies engaged in the rock, sand and gravel business in the Los Angeles area [R. 132-136, 233, 234].

The properties of Union were subject to a bond issue sold to the public in 1927. The properties of Consumers were subject to a bond issue sold to the public in 1928 [R. 134, 235].

After Consumers and Union became wholly-owned subsidiaries of Consolidated in 1929, instead of merging or consolidating, the parent company operated its subsidiaries pursuant to a so-called operating agreement by which the parent took over all current assets and assumed all current liabilities of the subsidiaries and was given the right to operate their respective properties, paying them sufficient to service their bond issues and to offset depreciation [R. 137-141, 236, 237].

With the balance of the proceeds received from the sale of its preferred and common stock not used to purchase the stock of Union and Consumers, Consolidated acquired certain properties of its own [R. 139].

All of the properties involved were operated by Consolidated as a unit. The use of the names of Union and Consumers in the business was discontinued. To all intents and purposes it was all Consolidated business and they were all Consolidated properties. The personal property, machinery, crushers, trucks and other equipment, became so commingled in the course of years of this unified operation that it would be impossible accurately to identify and segregate these properties of each of the companies [R. 150, 279].

In 1935, defaults having occurred in principal, sinking fund and interest payments due on the subsidiaries' bonds, Consolidated petitioned the District Court for reorganization under Section 77B of the Bankruptcy Act. The subsidiaries did likewise, and all asked that their properties be reorganized together [R. 145, 241, 267].

Consumers bondholders organized a Protective Committee (hereinafter called the "Consumers Committee"). Union bondholders also formed a Protective Committee (hereinafter called the "Union Committee"). These Committees are the petitioners herein.

After almost two years of negotiations between the Bondholders' Committees and Consolidated, a Plan of Reorganization was agreed upon in 1937 and approved by the holders of two-thirds of the Union bonds, two-thirds of the Consumers bonds, and a majority of each class of stock of Consolidated [R. 259, 270].

The Plan provides for the transfer of the properties of all the companies to a New Company which is to issue new Bonds secured by a blanket mortgage on all the properties, New Preferred Stock and New Common Stock [R. 26-33].

The bondholders of Union and Consumers are to receive for each \$1,000 bond: (a) \$500 in New Bonds, (b) \$500 in New Preferred Stock, and (c) warrants or options for the purchase of New Common Stock [R. 28, 29].

The preferred stockholders of Consolidated are to receive New Common Stock on a share for share basis. The common stockholders of Consolidated are to receive only warrants or options to purchase New Common Stock [R. 31].

One of three objectors to the Plan was E. Blois du Bois, respondent herein, who owned \$150,000 of Union bonds (out of a total of \$1,979,500 outstanding) and \$31,500 of Consumers bonds (out of a total of \$1,200,500 outstanding), most of which had been purchased after default or after the commencement of the reorganization proceeding at prices ranging from $14\frac{1}{2}\phi$ to 21ϕ on the dollar [R. 156, 157, 246].

The District Court referred the Plan to a special master; who after an extensive hearing recommended its approval [R. 129-159]. After argument on the master's report, the District Court filed its memorandum of conclusions on August 8, 1938 [R. 219-230] directing preparation of a formal decree, which was filed September 8, 1938, confirming that Plan [R. 231-265].

Du Bois, the objecting bondholder, appealed to the Circuit Court of Appeals for the Ninth Circuit on November 4. 1939, and that court rendered its opinion, with one dissent, affirming the decision of the District Court. This opinion is reported in 107 Fed. (2d) 96 (Advance Sheets). Two days later on November 6, 1939, this Court decided the case of Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106 (hereinafter called the "Los Angeles Lumber Products case"). Du Bois petitioned the Circuit Court of Appeals for a rehearing. The Securifies and Exchange Commission (hereinafter called the "S. E. C.") filed an amicus brief, urging that the petition be granted. The petition was granted, and the opinion of November 4, 1939, was withdrawn. Additional briefs were filed, and on June 19, 1940, the Circuit Court of Appeals, reversing its own previous position, rendered its decision (reported

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at 114 Fed. (2d) 102 (Advance Sheets)) reversing the decree of the District Court which had confirmed the Plan.

The Circuit Court of Appeals finally held, on the authority of the Los Angeles Lumber Products case, that the Plam is unfair as a matter of law because it denies full priority to the claims of the Union and Consumers bondholders respectively, and further that such priority is denied because under the Plan both classes of bondholders are to be given: (a) bonds secured by a blanket mortgage on all the properties (instead of separate issues of bonds secured by the same properties that secure the present bonds), and (b) preferred stock in a New Company which will own all the properties.

Prior to July 19, 1940, all parties to the appeal (including du Bois) Joined in a motion to the Circuit Court of Appeals to modify its opinion in so far as the latter ground is concerned (i. e., that priority is denied the bondholders because they are offered bonds secured by a blanket mortgage on the combined properties instead of by separate mortgages on the respective properties). The S. E. C. recommended the granting of this motion. This motion, however, was denied, although a motion to correct the opinion on minor points was granted.

Consolidated and its two subsidiaries and a committee of preferred stockholders of Consolidated then petitioned for a rehearing, which was denied on August 5, 1940.

Consolidated and the Consolidated Preferred Stock-holders' Committee then petitioned this Court for a writ of certiorari, which was granted on October 28, 1940, in Case No. 400.

The two Bondholders' Committees, petitioners herein, also petitioned this Court for a writ of certiorari, but on

the limited ground that the decision of the Circuit Court of Appeals was erroneous as a matter of law in so far as it holds that the "full priority" rule requires that each class of bondholders be given New Bonds secured by the properties originally securing them, instead of giving both classes of bondholders New Bonds secured by a blanket mortgage on the combined properties: The S. E. C, and the Interstate Commerce Commission filed amicus memoranda recommending that the Bondholders' Committees' petition be granted and that the petition of Consolidated and the Consolidated Preferred Stockholders' Committee in Case No. 400 be granted in so far as the latter presents the same question which is presented by the petition herein.

The Bondholders' Committees' petition herein was granted on October 28, 1940.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statute Involved.

The statute involved is Section 77B (f) of the Bankruptcy Act (11 U. S. C., Sec. 207 (f)), the pertinent portion of which is as follows:

"After hearing such objections as may be made to the plan the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible. * * *."

Question Involved.

The only question presented in this case (No. 444) is whether or not the Circuit Court of Appeals was correct as a matter of law in holding that the Plan denies full priority to the Union and Consumers bondholders merely because it provides for transferring all the properties of Consolidated, Union and Consumers to a New Company and substituting bonds of one issue secured by a blanket mortgage on all the properties for bonds of the two present issues secured, respectively, by the properties of Union and Consumers.

Meaning of Decision Below.

That the decision of the Circuit Court of Appeals presents this question is not open to doubt. The court could have limited its decision to holding that the Plan is unfair under the "full priority" rule on the ground that, although stockholders are accorded participation, the bondholders' claims to the full extent of the principal and accrued interest of their bonds are not given adequate compensation. That may have been the meaning that the court intended to convey, but the language used seems clearly to go further and state that full priority is denied the Union bondholders as to the Union assets because the Consumers bondholders are given an interest in those assets, and that full priority is denied the Consumers bondholders as to the Consumers assets because the Union bondholders are given an interest in those assets. Furthermore, this point was brought to the attention of the court in the motion for modification of the court's opinion referred to above, and the motion for such modification was denied.

The exact words used by the court in its opinion are (p. 107, Advance Sheets):

"The trial court found that the property of Union , covered by the trust indenture was insufficient to pay

the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given an interest in Consumers' property."

The only interest in the Union properties given to the Consumers bondholders under the Plan, and the only interest in the Consumers properties given to Union bondholders, result from the provision that all of the properties of the Debtor and its subsidiaries are to be transferred to a New Company, the liens of the present Union and Consumers bonds are to be released, and a new blanket mortgage is to be substituted therefor which is to secure one new issue of bonds to be allocated to the old Consumers and Union bondholders in proportion to their present holdings, and from the provision that the New Preferred Stock is to be similarly allocated to the old Union and Consumers bondholders.

The court's decision, therefore, is that a plan of reorganization involving two or more bond issues secured by liens on different properties is *per se* unfair and inequitable if it substitutes one new bond issue, secured by all of the properties, for the several old bond issues separately secured, or if it substitutes for the old bond issues, any new securities, whether part bonds and part stock, or all stock, constituting an interest in all of the properties.

Such a decision is not good law and should be corrected by this Court.

1. It is not compelled by either the decision or the principles of law stated by this Court in the Los Angeles Lumber Products case. In that case the Debtor was insclvent; yet the plan allowed the old stockholders to participate in the reorganized enterprise. This Court held that the participation of the stockholders was not "based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder" (p. 122). This Court held that the plan was therefore unfair and inequitable. In so holding this Court stated certain principles governing the fairness of plans of reorganization, which are not novelor revolutionary in the field of corporate reorganization, although they were certainly more completely and cogently stated in that opinion than ever before. Briefly stated, they are that secured creditors come first to the full extent of their claims, unsecured creditors second, and stockholders third; and if the assets are insufficient to satisfy any prior class in full, then no participation can be given a junior class unless a compensatory contribution is made by such junior class.

The creditors in the Los Angeles Lumber Products case comprised only a single class. Nowhere in the opinion in that case is there any indication that, where the creditors involved in a reorganization comprise two or more classes having separate liens on intermingled properties, the "full priority" rule requires that each class, to the exclusion of the other class or classes, receive securities

representing only a charge upon or an interest in the specific properties subject to the lien of their old securities. None of the decisions of this Court give sanction to a rule so rigid and impractical.

On the contrary, this Court recognized the importance of practicality in the application of the "fixed principle" of full priority. Circumstances alter such application. This is illustrated by the following passage from the opinion of this Court in the Los Angeles Lumber Products case:

"In application of this rule of full or absolute priority this Court recognized certain practical considerations and made it clear that such rule did not 'require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock.' Northern Pacific Ry. Co. v. Boyd, supra, p. 508 (228 U. S. 482). And this practical aspect of the problem was further amplified in Kansas City Terminal Ry. Co. v. Central Union Trust Co., supra (271 U. S. 445) by the statement that 'when necessary, they (creditors) may be protected through other arrangements which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances, to avail himself of this right.' (pp. 454-455)." (P. 117.)

The question in each case is: Are the new securities, regardless of their form, reasonably compensatory as to value and priority for the old securities for which they are being exchanged? In the instant case we have two bond issues, each secured by different properties. Assuming that the values of the respective properties bear the same ratio to the debts which they secure, it would seem obvious that new bonds of one issue equal in amount to the aggregate of the two old issues and secured by both properties would be reasonably compensatory (both as to value and priority) for the old bonds secured by the respective properties, and that the same would be true if the new securities were part new bonds secured by all the properties and part new preferred stock of a new company owning all the properties.

2. The holding of the Circuit Court of Appeals below is contrary to precedents which have involved similar facts.

Jameson v. Guaranty Trust Co. of New York, 20 Fed. (2d) 808 (C. C. A. 7), certiorari denied 275 U. S. 569, involved the reorganization of the Chicago, Milwaukee & St. Paul Railway Company through an equity receivership. Both the District Court and the Circuit Court of Appeals approved a reorganization plan which provided that the holders of outstanding bond issues, each secured by a lien or a particular portion of the company's properties, should participate equally in two new bond issues, as first mortgage and a second mortgage, each covering all of the properties by which the old bond issues had previously been separately secured.

This is common practice in the reorganization of traction companies and railroads. For example, in *In revunited Railways & Electric Co.*, 11 Fed. Supp. 717 (D. Md.), nine different security issues, each secured by a mortgage, were supplanted by a single issue of debentures and an issue of preferred stock, both of which were securities of a single corporation holding title to all of the properties. The District Court stated:

"There had been outstanding for many years 12 issues of securities, constituting the capitalization of the company. Of these, five were divisional bonds. and two were Maryland Electric Company bonds. which were substantially divisional bonds. Each one of these divisional bonds covered a railway which was originally an independent unit, a self-contained railway, but through the later consolidations this independent character was completely destroyed. The identity of the respective assets of each railway became lost and, therefore, it became absolutely essential to disregard the various divisions in the present reorganization, in so far as different securities were concerned, and simply to proportion, as nearly as possible, the actual values that now adhere to the respective parts, as represented by the old securities. Thus, under the reorganization, nine different mortgages with their respective securities have been supplanted by the issue of (1) debentures and (2) preferred stock." (P. 720.)

The Interstate Commerce Commission has also approved as fair and equitable a number of plans of reorganization of railroads in which the holders of bonds secured by divisional mortgages were given general system securities of the same classes in exchange for their claims.1

3. If the decision of the Circuit Court of Appeals which petitioners believe to be erroneous as a matter of law, is not reversed by this Court; it may be impossible to effect a reorganization of the debtor and its subsidiaries.

The properties of Union, Consumers and Consolidated consist principally of rock, sand and gravel pits and the plants and machinery necessary for the operation thereof, such as crushers, screeners and conveyers, as well as trucks for the transportation of the product. These have been operated as a unit for more than ten years. The real properties are all distinguishable, but much of the ma-

See Missouri-Paci R. R. Co. Reorganization, 239 I. C. C. 7, 240 I. C. C. 15; Chicago & North Western Railway Co. Reorganization, 236 I. C. C. 575, 239 I. C. C. 613, approved by the District Court for the Northern District of Illinois on September 11, 1940, C. C. H. Bankruptcy Service, Par. 52666; Chicago, Milwaukee, St. Paul and Pacific R. Co. Reorganization, 239 I. C. C. 485, 240 I. C. C. 257; Savannah & Atlanta Railway Reorganization, 224 I. C. C. 197, approved by the District Court for the Southern District of Georgia on February 5, 1938, C. C. H. Bankruptcy Service, Par. 51448, and confirmed on December 12, 1938; Spokane International Railway Company Reorganization, 228 I. C. C. 387, 233 I. C. C. 157, approved by the District Court for the Eastern District of Washington on March 2, 1940, C. C. H. Bankruptcy Service, Par. 52567, and confirmed on August 17, 1940; Erie R. Co. Reorganization, 239 I. C. C. 653, 240 I. C. C. 469; Western Pac. R. Co. Heorganization, 230 I. C. C. 61, 233 I. C. C. 409, 236 I. C. C. 1, approved by the District Court for the Northern District of California on August 15, 1940, C. C. H. Bankruptcy Service, Par. 52665; New York, N. H. & H. R. Co. Reorganization, 239 I. C. C. 337; Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization, 228 I. C. C. 645; St. Louis-S. F. Ry. Co. Reorganization, 240 I. C. C. 383; Chicago, Rock Island & Pacific Railway Company, Finance Docket No. 10028 (examiner's report on plan filed on September 22, 1939).

chinery and equipment is movable or is subject to replacement and in the course of operations this machinery has been transferred from one property to another or has been replaced with new machinery and equipment or with machinery and equipment from another plant, to such an extent that physical segregation would be impossible, no record having been kept of the transfers [R. 279, 280]. All of the parties, including du Bois, the respondent herein, have agreed that it is to the best interests of everyone that the properties be reorganized as a unit. The special master in his report, which was approved by the District Court, states [R. 147, 148]:

"The evidence shows that it would be to the injury of all interested parties, including the bondholders and stockholders, if any attempt were made to segregate the properties and place them back in their original. ownership, i. e., if the Union Company properties were to be returned to the Union Company, the Consumers Company properties to be returned to the Consumers Company, and the properties acquired by Consolidated to be segregated and retained by it. The evidence shows that there had been commingling of the various properties and assets, including rolling stock and other necessary equipment, during the period from 1929 to date. The operating revenue from the operations of the properties by Consolidated has been used upon all properties irrespective of the source from which it was produced. The funds secured by Consolidated from the sale of its stock and revenue acquired by Consolidated from operations of properties that Consolidated had acquired subsequent to the consolidation have been used to further the business as

a whole. All of these factors have made it practically · impossible to effect a fair and equitable segregation of the properties. Added to this is the fact that the properties have for the past eight years been operated: as if they were of one ownership. A going-business value and goodwill resulting from such ownership and joint operation has been created. From the foregoing I must conclude that it would be highly injurious and destructive of the best interests of the bondholders and stockholders of the various companies to attempt to do other than agree upon a plan of reorganization of Consolidated giving full recognition, so far as the values of the properties are concerned, to the respective interests of the bondholders and stockholders. All parties without exception at the hearing agreed that they were opposed to foreclosure and liquidation. All parties, except the objectors, were of the conviction that the plan of reorganization was the most fair, equitable and feasible to all interests that could be arrived at. All parties represented at the hearing, including the objectors (except Mr. Rogers), were convinced that a plan of reorganization which contemplated the continuance of the operation of all of the properties as one unit under one management and ownership offered the greatest assurance to the bondholders of the Union Company and the Consumers Company that they would be paid an amount approximating the par value of their bonds. Of similar opinion were the representatives of Consolidated and its stockholders, viz., that a plan of reorganization that contemplated the operation of the properties under one ownership and as one unit would undoubtedly insure the preservation for the stockholders of the equity remaining after the bondholders had been paid as provided in the plan of reorganization."

The District Court in approving the special master's report found [R. 241, 242]:

- "(a) That since the early part of 1929, and as originally contemplated and as permitted in said operating agreement, all of the business and properties of the debtor and its subsidiaries have been operated, handled and used as though there had been an actual consolidation of all thereof under one ownership.
- "(b) That as a result of said unified operation it would be physically impossible to determine and segregate with any degree of accuracy or fairness properties which originally belonged to the companies' separately; that in many instances plants, trucks and other equipment consisting of machinery and parts originally belonging to the companies separately are now physically joined together as a piece of operating equipment; that trucks and other equipment originally belonging to one of the companies have been traded in on new equipment now owned by Consolidated Rock Products Co. and that cash, accounts receivable and materials of every character and description have been commingled and are now in the main held by Consolidated without any way of ascertaining what part, if any thereof, belongs to each or any of the companies separately."

In the light of these facts, consider the problem of formulating a plan of reorganization that would not run afoul of the decision of the court below. The present

bondholders must be given either bonds or stock, or both. If New Bonds are given, they must be secured by the same properties that secure the present bonds. But this is impossible because the properties cannot be physically segregated; i. e., the personal property, machinery and equipment. 'If "impossible" is too strong a term, assume that the Union and Consumers properties could be identify fied. Then to comply with the holding, the New Bonds would have to be equal in amount to the old bonds. But this would be hardly feasible. The companies are in reorganization because of their inability to carry the present indebtedness. Yet if part bonds and part stock are given in exchange for each old bond, the only way to avoid the mandate of the court below would be to keep the identity of each of the present subsidiaries. This certainly would be unwise in view of their past unified operation and the evident desirability of continuing that operation. There would be the added complication of working out a fair participation for the present bondholders in the assets of the parent company. The result would be anything but simple.

We are confronted here with a case in which three companies have been scrambled physically without having been scrambled legally—a de facto omelette without de jure form. The reorganization proceeding offers the logical opportunity for simplifying the corporate and capital structures. We cannot and do not believe that this Court by anything said in its opinion in the Los Angeles Lumber Products case intended to make it impossible or impracticable to attain this desirable objective.

Conclusion.

Petitioners therefore contend that the decision of the Circuit Court of Appeals should be reversed in so far as it holds that a denial of full priority to the respective classes of bondholders results merely from the proposal that they be given New Bonds secured by a mortgage on all of the properties, and New Preferred Stock of a New Company which will own all of the properties.

In this connection it may be pointed out that the District Court found (1) that the value of all the properties exceeds the principal of and the accrued interest on the bonds affected by the Plan [R. 245], and (2) that an appraisal would be of no value to the court and result in unnecessary delay and expense [R. 255]. The record shows ample evidence to support these findings.² Unless this Court should determine to reinstate the decision of the District Court confirming the Plan, it would facilitate the reorganization proceeding below and the formulation of a new plan, to the best interests of all the security holders affected, if this Court were to indicate that on the state of the record no appraisal is necessary and would further

²Testimony of Robert Mitchell [R. 281, 282]; testimony of Frank Gautier [R. 290]; testimony of T. C. Rogers [R. 291, 292]; testimony of Graham L. Sterling, Jr. [R. 274, 275]. It should be noted that witnesses Mitchell and Gautier testified to the value of the respective companies' properties, "taking the plants as they are", i. e., on the assumption that all of the machinery and equipment located on land owned or leased by Union belongs to Union, and on the same assumption as to the plants of the other companies.

point out the respects in which it holds the Plan to deny full priority to the claims of the bondholders.

Respectfully submitted,

Paul Fussell, Homer I. Mitchell, Graham L. Sterling, Jr., W. B. Carman, Jr.,

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GIBSON, DUNN & CRUTCHER, Of Counsel.

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Supreme Court of the United States CLERK

October, Term 1940 No. 444.

In the Matter of CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation, Debtor.

UNION ROCK COMPANY, a corporation,

Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation, Subsidiary.

F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; and WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee,

E. BLOIS DU BOIS,

Respondent.

Respondent's Reply on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

KENNETH E. GRANT,

1215 Citizens National Bank Building, Los Angeles, Attorney for Respondent.

Mott & Grant, John G. Mott, Howard A. Grant, Of Counsel.

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reversing the judgment of the trial court confirming a proposed plan of reorganization under Section 77B of the Bankruptcy Act.

The judgment, as amended by order entered August 5, 1940 [R. 382-383], has not yet appeared in the official reports.

Jurisdiction.

The jurisdiction of this Court is invoked by petitioners under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) and Section 24 of the Bankruptcy Act (11 U. S. C. A. 47).

Statute Involved.

The statute involved is Section 77B(f) of the Bank-ruptcy Act (11 U. S. C. A. 207f), the pertinent portion of which is as follows:

"After hearing such objections as may be made to the plan the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *."

Question Presented by Petition.

Petitioners complain that the decision of the Circuit Court of Appeals is erroneous in

"adjudging that even though the mortgaged properties of two corporations have been commingled and operated for years as a unit, a plan of reorganization is unfair if it provides for one issue of bonds, issued in such amounts to the bondholders of the respective corporations as would give them security equivalent to the security they would have had if the plan had provided for two issues of bonds each secured by the properties of each respective company."

Discussion.

The petitioners do not attack the correctness of the decision of the Circuit Court of Appeals in so far as that Court found the proposed plan of reorganization to be in conflict with the "full priority" rule of Case v. Los Angeles Lumber Products Co., 308 U. S. 106, and the earlier equity reorganization cases of this Court. They complain only that the decision prevents, in any case, the elimination of separate and distinct bond issues, each having its separate security, and the substitution therefor of a common issue of bonds with common security. The portion of the decision complained of follows, italics being used by respondent to indicate the specific language to which objection is taken by the petitioners:

"It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered

by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since *Union bondholders and* debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., *supra*. Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan, some of which appear to be sound." [R. 377.]

The same point has been raised in Docket No. 400 by the petition of Consolidated Rock Products Co., a corporation, and Edward E. Hatch and Louis Van Gelder, constituting the preferred stockholders' committee of said corporation, also appellees below. Those petitioners, however, have attacked the decision below on various additional grounds.

As stated by respondent in his brief in answer to the petition involved in Docket No. 400, respondent does not believe that the decision below, properly construed, decides as a matter of law that separate bond issues, each having separate security, cannot be replaced in a Section 77B reorganization by a common issue of bonds with common security. However, if this Court is of the opinion that respondent is incorrect in this construction of the decision, respondent has no objection to such correction of the

decision as may be necessary to eliminate any question on the point.

Respondent did not attack the proposed plan of reorganization because of the fact that the separate bond issues of Union Rock Company and Consumers Rock & Gravel Company, Inc., each having its separate and distinct security, were replaced under the plan by a common issue of bonds secured by common indenture upon the properties of both companies. He did attack the proposed division of income as between the proposed new Series U and Series C bonds as inequitable and unfair to the present holders of bonds of Union Rock Company.

Respondent has felt that the italicized words in the portion of the decision quoted above were unnecessary to the decision and not responsive to any attack which had been made on the plan of reorganization. He joined with the appellees below in a petition asking that the decision be modified by striking out those words. The petition for modification was denied, from which it may be concluded that the Circuit Court of Appeals was of the opinion that the parties to the litigation were not properly construing the decision.

It will be noted that the Circuit Court of Appeals held the plan to be unfair simply for the reason that it failed to accord to bondholders of the corporations involved full priority as to the assets of these corporations. That the plan of reorganization is unfair is the only point of law actually decided. The decision only emphasizes the violation of the full priority rule by pointing out that

stockholders of Consolidated Rock Products Co. are permitted to share in the insufficient assets of the insolvent subsidiary corporations, and bondholders of each subsidiary share in the assets of the other. That this cross-participation by the bondholders is unfair as a matter of law is not declared by the Court, and respondent feels that the language used is merely to illustrate and emphasize the clear violation of the "full priority" rule.

Respondent files this reply merely in order that his position with respect to the limited attack made by the petitioning bondholders' protective committees will be clear.

Respectfully submitted,

KENNETH E. GRANT,

Attorney for Respondent.

Mott & Grant,
John G. Mott,
Howard A. Grant,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 400

Consolidated Rock Products Co., and Edward E. Hatch et al., Composing the Preferred Stockholders Committee of Consolidated Rock Products Co., petitioners

v.

E. Blois du Bois

No. 444

F. B. BADGLEY ET AL., COMPOSING THE UNION ROCK COMPANY, BONDHOLDERS' PROTECTIVE COMMIT-TEE ET AL., PETITIONERS

v.

E. Blois du Bois

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

On June 19, 1940, the Circuit Courf of Appeals for the Ninth Circuit reversed an order of the District Court for the Southern District of California confirming a plan of reorganization for Consolidated Rock Products Company (hereinafter called "Consolidated") and its two subsidiaries, Union Rock Company (hereinafter called "Union"), and Consumers Rock and Gravel Company, Inc. (hereinafter called "Consumers"). Two petitions for writs of certiorari have been filed to secure review by this Court of the order of reversal. No. 400 is a petition filed by Consolidated and a committee of its preferred stockholders. No. 444 is a petition filed by two protective committees for Union's and Consumers' bondholders, respectively.

This memorandum is filed on behalf of the Securities and Exchange Commission, as amicus curiae, to urge (1) that the petition in No. 444 be granted; and (2) that the petition in No. 400 be granted to the extent that it presents the same question as that presented by the petition in No. 444, but that it be otherwise denied.

OPINIONS BELOW

The District Court rendered no opinion; its findings and conclusions appear at R. 219–265. The opinion of the Circuit Court of Appeals directing reversal of the decree of the District Court (R. 365–380) is not yet reported. An earlier opinion of the Circuit Court of Appeals directing affirmance of the decree of the District Court was withdrawn by the court (R. 364); that opinion is not a part of the record, but it may be found in 107 F. (2d) 96, advance sheets.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 19, 1940 (R. 381). The petition for a writ of certiorari in No. 400 was filed on September 6, 1940, and the petition for a writ of certiorari in No. 444 was filed on September 18, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Consolidated, Union and Consumers each filed a petition to reorganize under Section 77B of the. Bankruptcy Act. Union and Consumers each has an outstanding issue of bonds, each issue being secured by a mortgage on the properties owned by the issuing company. The District Court found that in the case of neither company are the properties owned by it of a value equal to the face amount of the bonds issued by it, plus accrued interest. It also found that the properties of all three companies are commingled and have long been operated together as a single unit, and that it is necessary and desirable to maintain operations on a unified basis. A simple plan of reorganization has been filed for all three companies, providing for the organization of a new corporation to acquire the properties of the companies and for the issuance to the bondholders of Union and Consumers, among other things, of a single issue of bonds of the new corporation secured by a mortgage on all'of its property.

The only question presented in No. 444 is whether this plan is, as a matter of law, unfair and inequitable solely because the bondholders of each company must share the property securing their bonds with the bondholders of the other company, even though they receive by way of compensation an equivalent intent in the property securing the bonds of the other company.

The same question is presented in No. 400. Petitioners in No. 400, however, seek review of the following additional questions: (1) whether the rule announced by this Court in Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, is inapplicable to the present plan of reorganization on the ground that the combined enterprise of Consolidated, Union and Consumers is solvent; and (2) whether, if the rule in the Los Angeles Lumber case is applicable, the court below erred in failing to find that the present plan meets the requirements of that rule.

Petitioners in No. 400 state that there is also presented the question whether a circuit court of appeals can usurp the function of a district court by reversing a conclusion of the district court that a plan of reorganization is fair and equitable. The issue thus sought to be raised is wholly without substance. Petitioners erroneously assume that the conclusion of a district court with respect to a plan is a finding of fact, despite the specific holding by this Court that the conclusion is one of law. Case v. Los Angeles Lumber Products Co., Ltd., supra. In any event, the appeal in this case was taken under Section 24 (a) of the Bankruptcy Act (11 U. S. C., Sec. 47 (a)). This section, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 854-855), provides for review of questions of fact as well as of questions of law.

STATUTE INVOLVED

The statute involved is Section 77B (f) of the Bankruptcy Act (11 U. S. C., Sec. 207 (f)), the pertinent portion of which is as follows:

After hearing such objections as may be made to the plan the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *.

STATEMENT

1. REORGANIZATION PROCEEDINGS

A plan of reorganization for Consolidated, Union, and Consumers was confirmed by the District Court on September 8, 1938 (R. 261–264). On November 4, 1939, the Circuit Court of Appeals rendered an opinion affirming the order of confirmation. After the decision of this Court in Case v. Los Angeles Lumber Products Co., Ltd., 308 U.S. 106, the court below granted a petition for rehearing and ordered its first opinion withdrawn (R. 363–364). Upon the rehearing, the order of confirmation was reversed.

No useful purpose would be served by setting forth here the facts with reference to the properties and securities of the three companies in reorganization, and with reference to the provisons of the plan of reorganization, since full recitations of these facts are contained in the petitions for certiorari, in the brief in opposition filed by the re-

spondent in No. 400, and in the opinion of the court below.

2. PARTICIPATION OF THE SECURITIES AND EXCHANGE OF

The Securities and Exchange Commission first appeared in the present case by filing a brief umicus curiae upon the rehearing in the court below. After entry of the decree of reversal the Commission filed a notice of appearance in the District Court pursuant to Sections 208 and 276c. (2) of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. Secs. 608, 676c. (2)). The Commission is now participating as a party in the proceeding before the District Court.

In its brief filed in the court below the Commission sought reversal of the order of confirmation, urging that the plan of reorganization, failed to meet the requirements of the rule enunciated in Case v. Los Angeles Lumber Products Co., Ltd., supra. The court below reversed the order of confirmation as requested by the Commission, but it did so, in part at least, upon a ground which the Commission believes to be untenable and which, if . allowed to stand, may not only seriously impede the reorganization of the three companies involved in this case but may also embarrass the reorganization of many other companies which have filed petitions to reorganize under the Bankruptcy Set. Because of the advisory functions which the Commission performs in reorganizations under Chapter X, as well as because of its participation in the present proceeding, the Commission has a substantial interest in having the Court review this aspect of the decision below.

ARGUMENT

Upon the rehearing in the court below, the respondent and the Commission contended that the order of confirmation should be reversed because the plan of reorganization failed to meet the requirements of the rule enunciated in Case v. Los Angeles Lumber Products Co., Ltd., supra. The basis of the contention was that the plan did not provide fully compensatory treatment for the bondholders of Union and Consumers to the extent of the value of the assets subject to their claims, and yet allowed participation in those assets by the preferred stockholders of Consolidated whose position was junior to that of the bondholders. The court below held that the findings of the District Court were inadequate to allow final disposition of this contention, since the findings failed to show the value of the properties subject to the lien of the bonds issued by Union and Consumers, the value of any assets of Consolidated and the value of disputed claims, aggregating \$5,000,000, which Union and Consumers had against Consolidated (R. 373-374).

The court might have stopped at this point and remanded the case to the District Court for further

findings. Instead of so doing, however, it simply observed (R. 374) that "since the plan proposed, we think, is unfair as a matter of law for reasons hereafter stated; we assume that both matters mentioned will be satisfactorily disposed of upon remand of the cause."

The reasons why the court believed the plan to be unfair as a matter of law were then stated by it in the following words (R. 377):

The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets. since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., supra. Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other' charges of unfairness in the plan some of .. which appear to be sound.

As we understand this portion of the opinion, the court below held that a class of claimants with a lien on particular properties must receive fully compensatory treatment out of those properties and may not as a matter of law receive less than fully compensatory treatment out of those properties even though this class of claimants may be adequately compensated with an interest in properties subject to the lien of another class of claimants. This holding, unless reversed by this Court,

But whatever the court may have meant by its reference to the preferred stockholders, it plainly intended to announce the principle of law stated in the text in so far as it held the plan unfair as a matter of law because each group of bondholders was required to share its security with the, other group of bondholders. No other construction can be given to the words (R. 377) that "the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders * * * are given an interest in Union's property" and that "Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders * * are given an interest in Consumers' property." That the mention of the interest given to each group of bondholders in the assets of the other group was not inadvertent is shown by

² This portion of the opinion is not entirely clear in so far as it declares the plan to be unfair to the bondholders because the preferred stockholders of Consolidated are given an interest in the assets securing the bonds. The court may have meant simply that the participation of the preferred stockholders in the plan was unfair to the bondholders because the bondholders had not received full priority; it may have meant, on the other hand, that the preferred stockholders should not have been allowed to share in the particular assets securing the bonds because the bondholders had not received fully compensatory treatment out of those assets.

will necessarily control all further steps in the present reorganization proceeding. Consequently, it is reviewable by this Court independently of other grounds upon which the order of reversalmay be sustained.

1. The principle of law thus announced by the court below presents a question of substantial public importance which has not been but should be, decided by this Court. The question arises in many industrial and railroad reorganizations where it is necessary or desirable to maintain uni-

the fact that the court below denied a motion, joined in by all of the parties, to medify this paragraph of the opinion so as to delete references to the interest given to each group of bondholders in the property securing the claims of the other group of bondholders. (R. 382-383.)

³ We do not express an opinion as to whether it is either necessary or desirable, in the circumstances of this case, that the properties continue to be operated as a unit and that the separate liens be displaced. The Master (R. 147-148) and the District Court (R. 261, 241) so found, and the Circuit

Court of Appeals did not question this finding.

The denial of these petitions would result in the issuance of a mandate by the court below remanding the case to the District Court for further proceedings in accordance with the opinion of the court below. See Rule 28 of the Rules of the Circuit Court of Appeals for the Ninth Circuit. The District Court would thereafter be bound to conduct further proceedings in accordance with the principle of law announced by the court below. Consequently, although we believe the order of reversal to be correct for other reasons (see pp. 15-18, infra), this ground of decision may be separately reviewed. If certiorari be granted, we shall ask this Court to direct modification of the decree of the Circuit Court of Appeals insofar as it requires conformity to the principle of law concerning which we urge review.

fied operation of properties mortgaged to secure separate bond issues and where considerations of feasibility require a simplified capital structure. The problem may also arise, even in the absence of liens, with respect to the treatment of the securities of any two or more corporations the properties of which it is necessary or desirable to combine in a single reorganized corporation.

In the reorganization of traction companies and railroads it is common practice to give to separate classes of security holders, in exchange for securities with liens on portions of the railway properties, securities of the same class or classes representing claims against the enterprise as a whole. Decisions sustaining such plans of reorganization are in principle directly opposed to the holding of the court below.

In In re United Railways and Electric Company, 11 F. Supp. 717 (D. Md.), for example, nine different security issues, each secured by a mortgage (in almost every case a divisional lien), were supplanted by a single issue of debentures and an issue of preferred stock, both of which were securities of a single corporation holding title to all of the former divisional properties. The District Court stated (p. 720):

There had been outstanding for many years 12 issues of securities, constituting the capitalization of the company. Of these, five were divisional bonds, and two were Maryland Electric Company bonds, which

were substantially divisional bonds. Each one of these divisional bonds covered a railway which was originally an independent unit, a self-contained railway, but through the later consolidations this independent character was completely destroyed. identity of the respective assets of each railway became lost and, therefore, it became absolutely essential to disregard the various divisions in the present reorganization, in so far as different securities were concerned, and simply to proportion, as nearly as possible, the actual values that now adhere to the respective parts, as represented by the old securities. Thus, under the reorganization, nine different mortgages with their respective securities have been supplanted by the issue of (1) debentures and (2) preferred stock.

A typical railroad case is Jameson v. Guaranty Trust. Company of New York, 20 F. (2d) 808 (C. C. A. 7th), certiorari denied, 275 U. S. 569. That was an equity receivership in which the District Court and the Circuit Court of Appeals approved a reorganization plan providing that the holders of outstanding bond issues, each secured by a lien on a particular portion of the company's property, should participate equally in two new bond issues, a first mortgage and a second mortgage, each covering all of the properties by which the old bond issues had previously been separately secured.

More recently, in reports under Section 77 of the Bankruptcy Act (11 U. S. C. § 205), the Interstate Commerce Commission has approved as fair and equitable a number of plans of reorganization for railroads in which separate classes of divisional lienors were given general system securities of the same classes in exchange for their claims. Several of these reports were filed subsequent to the decision of this Court in Case v. Los Angeles Lumber Products Co., Ltd., supra.

⁵ See Missouri-Pacific R. R. Co. Reorganization; 239 I. C. C. 7, 240 I. C. C. 15; Chicago and North Western Railway Co. Reorganization, 236 I. C. C. 575, 239 I. C. C. 613, approved by the District Court for the Northern District of Illinois on September 11, 1940, C. C. H. Bankruptcy Service, Par. 52666; Chicago, Milwaukee, St. Paul and Pacific R. Co. Reorganization, 239 I. C. C. 485, 240 I. C. C. 257; Savannah & Atlanta Railway Reorganization, 224 I. C. C. 197, approved by the District Court for the Southern District of Georgia on February 5, 1938, C. C. H. Bankruptcy Service, Par. 51448, and confirmed on December 12, 1938; Spokane International Railway Company Reorganization, 228 I. C. C. 387, 283 I. C. C. 157, approved by the District Court for the Eastern District of Washington on March 2, 1940, C. C. H. Bankruptcy Service, Par. 52567, and confirmed on August 17, 1940; Erie R. Co. Reorganization, 239 I. C. C. 653, 240 I. C. C. 469; Western Pac, R. Co. Reorganization, 230 I. C. C. 61, 233 I. C. C. 409, 236 I. C. C. 1, approved by the District Court for the Northern District of California on August 15, 1940, C. C. H. Bankruptcy Service, Par. 52665; New York, N. H. & H. R. Co. Reorganization, 239 I. C. C. 337; Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization, 228 I. C. C. 645; St. Louis-L. F. Ry. Co. Reorganization, 240 I. C. C. 383; Chicago, Rock Island & Pacific Railway Company, Finance Docket No. 10028 (examiner's report on plan filed on September 22, 1939).

Reorganization in some types of cases might be impossible under the holding of the court below. The reorganization provisions of the Bankruptev. Act, and comparable provisions of other statutes. require that a plan of reorganization be feasible as well as fair and equitable. If the holding of the court below is correct, a plan of reorganization which fails to preserve priorities of separate lienors against the properties securing their respective claims cannot be fair. Yet in many cases any plan attempting to preserve separate liens would necessitate so complicated a capital structure that it would not be feasible. Consequently, in some cases, no plan of reorganization complying with the statutory standards would be possible.

We believe it plain that the Los Angeles Lumber decision does not require that a plan be held unfair and inequitable, as a matter of law, where bondholders receive less than complete priority

V. Sec. 77 (e), 11 U. S. C. § 205 (e); Sec. 77B (f), 11 U. S. C. § 207 (f); Chapter X, Secs. 174 and 221 (2), 11 U. S. C. § 574 and 621 (a); Chapter XI, Sec. 366 (3), 11 U. S. C. § 766 (d); Chapter XII, Sec. 472 (3), 11 U. S. C. § 872 (3); Chapter XIII, Sec. 656 (3), 11 U. S. C. § 1956 (3).

⁷ Section 11 (e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. § 79k (e), authorizes the Securities and Exchange Commission to approve, and to take steps to enforce, plans of reorganization of registered public-utility holding companies or their subsidiaries which must be both "fair and equitable" and "necessary to effectuate the provisions of subsection (b)". Among other things, Sec. 11 (b) requires the Commission to direct each registered holding company and subsidiary, thereof to insure that its corporate structure is not unduly or unnecessarily complicated.

with respect to the assets on which they have a lien. provided that they are adequately compensated for the loss of their prior claims by an interest in other assets. Obviously, lienors may have to surrender their priority to, or share it with, persons who contribute new funds to the enterprise; in such case their compensation will consist in the acquisition of an interest in the new funds. The present situation is similar, except that the contribution is in property rather than in money. Consumers' bondholders share their priority with persons who contribute property necessary for the success of. the enterprise as a whole, namely, the Union bondholders; the converse is equally true. So long as each group shares on an equitable basis in the securities of the combined enterprise, the plan of reorganization satisfies the requirements of the Los Angeles Lumber rule.

2. The question just discussed is the only one presented in No. 444. We urge, therefore, that the petition in No. 444 be granted. The petition in No. 400, however, seeks to raise additional questions which, in our opinion, do not warrant review by this Court. Consequently, we urge that in No. 400 the petition be granted only to the extent that it raises the same question as that presented in No. 444.

A. The first of the additional questions sought to be raised in No. 400 is whether the rule of the Los Angeles Lumber case is inapplicable to the present reorganization on the ground that the combined en-

terprise of Consolidated, Union, and Consumer Although the court below held that rule was applicable to a solvent Debtor, consider tion of the question by this Court at the pres time would be premature, since, as the court be held, the findings of the District Court are ina quate to determine the solvency of the enterpr and, consequently, the extent, if any, of the ri of the preferred stockholders to be recognized the plan of reorganization (R. 379-380). court below assumed that, upon remand of case, further findings with respect to the value the companies' properties would be made (R. 37 it did not rule that, if these further findings sl that there is an equity for the preferred sto holders, they may not participate in the reorgan tion. Consequently, at this stage of the proceed ings, the only issue which could be presented this Court is whether the court below erred in c cluding that the findings of the District Court w inadequate. This issue is obviously not one call for review.

Furthermore, the proposition that the full ority rule of the Los Angeles Lumber case does apply to a solvent enterprise is so manifestly wout substance as not to warrant consideration this Court. Petitioners' contention is, in effect that while creditors' rights must be fully protect in the case of an insolvent debtor, they need not

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regarded with the same solicitude if a debtor is net insolvent,. This contention misconceives the plain meaning and logic of the Los Angeles Lumber It is true that, if the corporation is insolvent, the creditors' priorities necessitate the exclusion of stockholders, while, if the corporation is solvent, stockholders may be entitled to participate in the reorganization. But the exclusion of stockholders of an insolvent corporation is required because no equity remains for them after full satisfaction of creditors; the inclusion of stockholders of a solvent corporation is permitted because some equity remains, after full satisfaction of creditors, justifying their participation. The difference is factual, not legal, for creditors of a solvent corporation clearly have no less right to priority to the full extent of their claims than do creditors of an insolvent corporation.

The lower federal courts are all in agreement with the decision below in this case that the rule of strict priority applies to solvent as well as to insolvent corporations. See In re Utilities Power & Light Corporation, 29 F. Supp. 763 (N. D. Ill.), appeal dismissed by the Circuit Court of Appeals for the Seventh Circuit, March 9, 1940; In re Chicago Great Western Railroad Co., 29 F. Supp. 149 (N. D. Ill.); In re National Food Products Corporation, 23 F. Supp. 979 (D. Md.). Agreement with this view is also implicit in decisions affirming

orders which had confirmed plans of reorganization in In re Porto Rican American Tobacco Company, 112 F. (2d) 655 (C. C. A. 2nd) and in In the Matter of Oscar Nebel Co., Inc. (C. C. A. 3d), decided July 8, 1940, but not reported.

B. The second additional question sought to be raised by petitioners in No. 400 is whether, assuming the Los Angeles Lumber decision to be applicable, the court below erred in failing to find that the plan of reorganization complied with the requirements of that decision. Even on the basis of the inadequate findings of the District Court, we believe it plain that, under the plan, the bondholders of Union and Consumers receive securities of a value less than the asset value of their claims and, therefore, that they are not accorded the full priority which the Los Angeles Lumber decision requires to be given them before stockholders may participate in the reorganization. But whether this be so or not is immaterial for present purposes since, as we have pointed out, the court below did not rule on the question of whether the preferred stockholders of Consolidated should be allowed to participate in the reorganization at all and, if allowed to participate, whether or not the provision made for them in the plan was unfair to the bondholders. To the contrary, it held that it could not decide this question because the findings of the District Court were inadequate both with respect to the value of the properties securing the Union and Consumers bonds and with respect to the value of the claims of these companies against Consolidated. Consequently, the only question which could properly be presented to this Court on this aspect of the case would be whether the court below erred in holding that the findings of the District Court were insufficient. This question is plainly not one with which this Court should concern itself.

CONCLUSION

We urge that the petition in No. 444 be granted, and that the petition in No. 400 be granted to the extent that it raises the same question as that pre-

⁸ The petitioner suggests that a question is presented as to the applicability of the Los Angeles Lumber case to a situation where stockholders are allowed to participate because of the compromise of disputed claims, i. e., the claims of Union and Consumers against Consolidated. With reference to the asserted compromise, the record simply shows that Union and Consumers had claims against Consolidated which were disputed both as to validity and amount, and that under the plan of reorganization the claims would be eliminated. The court below held that the findings of the District Court were insufficient to determine the validity or value of the claims and for this reason, among others, held that, until the claims were settled either voluntarily or by litigation, it could not determine the fairness of any plan of reorganization. Consequently, there cannot now be presented to this Court the question of the effect of the asserted compromise.

sented by the petition in No. 444, but that it be otherwise denied.

Respectfully submitted.

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OCTOBER 1940.

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Inthe Supreme Court'of the United States

OCTOBER TERM, 1940

Nos. 400, 444

CONSOLIDATED ROCK PRODUCTS CO. ET AL., COMPOS-ING THE PREFERRED STOCKHOLDERS COMMITTEE OF CONSOLIDATED ROCK PRODUCTS CO., PETITIONERS

E. Blois du Bois

F. B. BADGLEY ET AL., COMPOSING THE UNION ROCK COMPANY, BONDHOLDERS' PROTECTIVE COMMITTEES. ET AL., PETITIONERS

v

E. Blois DU Bois

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

The Interstate Commerce Commission, as amicus curiae, joins with the Securities and Exchange Commission in urging this Court to grant the petition for a writ of certiorari in No. 444 and to grant

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the petition for a writ of certiorari in No. 400 to the extent that it presents the same question as that presented in No. 444. The interest of the Interstate Commerce Commission arises from the fact that under subdivision (d) of Section 77 of the Bankruptcy Act, the Commission is charged with the duty of approving a plan of reorganization (or refusing to approve any plan of reorganization) for railroad corporations which have filed petitions to reorganize under Section 77. Section 77 (e) provides that the plan must be "fair and cquitable." The question of whether the decision in Case v. Los Angeles Lumber Co., Ltd., 308 U. S. 106, requires that a plan of reorganization, to be fair and equitable, must preserve the priorities of separate lienors against the particular assets securing their respective claims is of peculiar importance in railroad reorganizations because of the widespread use of divisional mortgages as a inethod of railroad financing, and because of the great public interest in the unified and continued operation of railroad properties.

Respectfully submitted.

FRANCIS BIDDLE, Solicitor General.

David W. Knowlton,

Chief. Counsel,

Interstate Commerce Commission.

OCTOBER 1940.

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Nos. 400 and 444

In the Supreme Court of the United States

OCTOBER TERM, 1940

CONSOLIDATED ROCK PRODUCES CO., AND EDWARD E. HATCH ET AL., COMPOSING THE PREFERRED STOCK-HOLDERS COMMITTEE OF CONSOLIDATED ROCK PRODUCES CO., PETETIONERS

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION
AS AWICUS COMIAN.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 400

CONSOLIDATED ROCK PRODUCTS CO., AND EDWARD E. HATCH ET AL., COMPOSING THE PREFERRED STOCK-HOLDEPS COMMITTEE OF CONSOLIDATED ROCK PRODUCTS CO., PETITIONERS

v.

E. Blois du Bois

No. 444

F. B. BADGLEY ET AL., COMPOSING THE UNION ROCK COMPANY BONDHOLDERS' PROTECTIVE COMMITTEE, ET AL., PETITIONERS

v.

E. Blois du Bois

ON WRITS OF CERT ORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The District Court rendered no opinion; its findings and conclusions appear at R. 219-265. The

opinion of the Circuit Court of Appeals (R. 365–380), as modified (R. 382), directing reversal of the order of the District Court is reported in 114 F. (2d) 102. An earlier opinion of the Circuit Court of Appeals directing affirmance of the order of the District Court was withdrawn by the court (R. 364); that opinion is not a part of the record, but it may be found in 107 F. (2d) 96, advance sheets.

JURISDICTION

The decree of the Circuit Court of Appeals reversing the order of the District Court was entered on June 19, 1940 (R. 381). Petition for rehearing was denied by the Circuit Court of Appeals on August 5, 1940 (R. 383). The petition for a writ of certiorari in No. 400 was filed on September 6, 1940, and the petition for a writ of certiorari in No. 444 was filed on September 18, 1940. Certiorari was granted in both cases on October 28, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

'The Circuit Court of Appeals reversed an order of the District Court confirming a plan of reorganization for Consolidated Rock Products Company and its two wholly-owned subsidiaries, Union Rock Company and Consumers Rock and Gravel Company, Inc. The questions are:

- (1) Whether the court below correctly held that the findings of the District Court on the question of the valuation of the properties of these companies were inadequate.
- v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, the plan of reorganization is unfair and inequitable to the bondholders of Union and Consumers because the stockholders of Consolidated are permitted to participate although the bondholders do not receive fully compensatory treatment for their claims.
- (3) Whether the plan is, as a matter of law, unfair and inequitable to the bondholders of Union and Consumers inter sese on the ground that the bondholders of each company are required to share the property securing their bonds with the bondholders of the other company, even though they receive compensation in the form of interests in other property.

STATUTE INVOLVED

The statute involved is Section 77B (f) of the Bankruptcy Act (11 U. S. C., Sec. 207 (f)), the pertinent portion of which is as follows:

After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *.

Other sections of the Bankruptcy Act hereinafter cited are printed in the Appendix, infra, pp. 53-53.

STATEMENT

These proceedings were instituted on May 24, 1935, by the filing of separate voluntary petitions under Section 77B of the Bankruptey Act by Consolidated Rock Products Company (hereinafter called Consolidated) and by its two wholly owned subsidiaries, Union Rock Company (hereinafter called Union) and Consumers Rock and Gravel Company, Inc. (hereinafter called Consumers) (R. 267). Consolidated has been in possession of all the properties of the three companies throughout the proceedings (R. 267–268). No trustee has been appointed for any of the ampanies.

Capital Structure and Relation between the Companies—Consolidated was organized in 1929 to acquire the outstanding capital stock of Union and Consumers, which were at that time competitively engaged in the business of mining, processing and marketing rock, sand, and gravel in southern California. Both Union and Consumers then had outstanding separate bond issues secured by trust indentures on their respective properties (R. 235). There are now outstanding in the hands of the public \$1,877,000 of Union bonds on which interest has been in default since March 1, 1934. This interest aggregated \$403,555 as of April 1, 1937, the effective date of the plan. There are now

outstanding in the hands of the public \$1,137,000 of Consumers bonds, on which interest has been in default since July 1, 1934. This interest aggregated \$221,715 as of April 1, 1937. (R. 189, 191–192.)

To secure funds for the acquisition of Union's and Consumers' stocks, Consolidated issued its own preferred and common stock (R. 234). Consolidated now has outstanding 285,947 shares of preferred stock without par value but with a liquidation preference of \$25 per share plus accrued dividends, and 397,455 shares of common stock without par value (R. 25, 136).

Upon acquiring control of Union and Consumers, Consolidated designated their directors and officers (R. 236). It then caused the subsidiaries to execute an operating agreement with it (R. 236) pursuant to which Consolidated took over the possession, operation, management and financing of their properties. Under the terms of the agreement, Consolidated undertook to maintain the properties of the subsidiaries in first class condition; to keep proper records of all transactions between the parties, including proper entries concerning depreciation, depletion, amortization and obsolescence in compliance with the trust inden-

The agreement also covered the properties of Reliance Rock Company, a wholly owned subsidiary of Union (R. 236, 233-234). Legal title to all the properties of Union, Consumers, and Reliance, except current assets, was formally retained by these companies (R. 164).

tures of the subsidiaries; to pay them the amounts necessary to enable them to meet the interest and sinking fund provisions of their trust indentures; and to carry out the covenants of the trust indentures (R. 165–168). Consolidated was to retain all the net revenues of the properties that might remain (R. 171).

Consolidated also agreed to credit the current. accounts of the subsidiaries with items of depreciation, depletion, amortization and obsolescence (R. 171). Upon termination of the agreement, the properties were to be returned and a final settlement of accounts made, including payment by Consolidated of the items of depreciation, depletion, amortization, and obsolescence credited to the subsidiaries (R. 174). The agreement provided that it was made for the mutual benefit of the parties thereto and not made "for the benefit of any third person as that term is used in Section 1559 of the Civil Code of the State of California" (R. 174-175). It further provided that any part might withdraw from the agreement upon 30 days' notice, and that the agreement was to terminate when such notice was given by all of the subsidiaries to Consolidated or by Consolidated to all of the subsidiaries R. 173-174).

On February 16, 1933, Consolidated accomplished a purported modification of the operating

agréement (R. 176, 237) through an instrument signed by the president and secretary of Consolidated; who also signed as president and secretary of each of the subsidiaries (R. 182). This modification agreement provided that the depreciation to be credited to the subsidiaries by Consolidated for the entire period of the operating agreement, beginning retroactively as of the execution of the original operating agreement, should be credited only upon the termination of the agreement. The amount of the credit was to be arrived at on the basis of retroactive appraisals, made after the termination of the agreement, of the value of the properties as of April 1 of each year. The provision of the original agreement for withdrawal of any party upon 30 days' notice was eliminated and it was provided instead that, except in the case of default, the agreement was to run for five years from the date of the modification, with an option in Consolidated to extend the agreement for a further term of five years upon one year's written notice. In the event of default by Consolidated as to any subsidiary, that subsidiary could termi-. nate upon sixty days' notice in writing. Consolidated was under no obligation to pay any amounts for depreciation until termination of the agreement, and then had the privilege, by paying an additional five per cent penalty, of paying 25 per cent of the amount of the depreciation credit in

75 per cent at the end of the tenth year from the date of termination of the agreement (R. 178-181). Under the provisions of the modification agreement, therefore, it was possible for Consolidated to avoid determination of the amount of the depreciation credit until retroactive appraisals were made ten years after execution of the agreement, and to avoid payment of 75 per cent of the amount so determined for 20 years after execution of the agreement.

After the execution of the original operating agreement, Consolidated operated the properties of all the companies as though there had been an actual consolidation thereof under one ownership although the corporate existence of the subsidiaries was maintained (R. 140-141, 241). With a decline in the volume of business and a consequent contraction of operations, equipment and material from nonoperating properties were used to supply shortages in operating properties without regard to original ownership, so that, as the District Court found, it became impossible to determine accurately what assets were subject to the indentures of each of the subsidiaries (R. 241-242; 279-280). Consolidated's own equipment purchased both at the time of its organization and subsequently to replace worn-out equipment of all the companies, was likewise intermingled with the properties of the subsidiaries (R. 139-140, 149-150, 241-242, 316). Consolidated's vice-president testified that the properties purchased by Consolidated had an original cost of \$860,007.39 and a net value, as of September 30, 1937, of \$296,465.58 (R. 286).

Consolidated has never undertaken to have the subsidiaries' properties appraised, even though defaults in the payment of principal and interest on both Union and Consumers bonds occurred in 1933 and 1934 (R. 241), the companies have been in reorganization since May, 1935 (R. 267), and the modification agreement expired according to its' terms in February 1938. Consolidated's books have been kept in accordance with the terms of the original operating agreement and no attempt has been made to record any revised depreciation charges (R. 236, 280–1, 299). They show a net indebtedness to Union and Consumers, as of June 30, 1938, of over \$5,000,000 (R. 314–319).

Valuation.—The District Court did not find specific values for the properties of either Consoli-

The modification agreement provided for earlier termination in the event of default in any of Consolidated's covenants, including the covenant to pay the sums necessary to meet interest and sinking fund requirements on the subsidiaries' bonds (R. 167–168, 181). However, under the terms of the agreement, termination could be effected only by notice from the subsidiaries to Consolidated. The subsidiaries were at all times under the control of Consolidated, and no such notice was given.

dated, Union or Consumers or for the properties. of the enterprise as a whole. The court did find. generally; that the value of the assets of the combined enterprise exceeded the aggregate claims of the bondholders, including interest to April 1, 1937. but was less than the amount of such claims plus the claims of Consolidated's preferred stockholders, including dividend accumulations (R. 245). The court further found that the value of the assets subject to the respective liens of the Union and Consumers bondholders was, in each ease, less than the principal and interest due on their bonds (R. 245). The court below thought this finding to be inconsistent with the finding that the assets of the three companies have been so commingled that identification thereof is impossible (R. 374).

Three witnesses testified concerning values, and the valuations given by them are tabulated in the opinion of the court below (R. 371). The average of the valuations, which is apparently accepted as correct by petitioners (Br. 31), shows Union with assets worth \$2,202,733, as against a bonded indebtedness, including interest, to April 1, 1937, of

³ All references to petitioners in this brief, unless otherwise expressly stated, are to petitioners in No. 400. As pointed out below (p. 16), the petitioners in No. 444 have raised only the third of the questions presented and the Commission is in agreement with their position on that question.

\$2,280,555, and Consumers with assets worth \$1,-151,033, as against a bounded indebtedness, including interest to April 1, 1937, of \$1,358,715. On the basis of similar averaging of the testimony of witnesses (R. 281-282, 290), petitioners assert that the value of Consolidated's assets is \$859,784 exclusive of goodwill and trade names, which are arbitrarily valued at \$500,000 on the basis of the testimony of Mitchell, Consolidated's vice president (Br. 26, 27, 30; R. 282).

The testimony upon which petitioners rely for these valuation figures was apparently based on physical factors without reference to data concerning earning power. This testimony conflicts with the consolidated balance sheets furnished by Con-·solidated, which show the enterprise to be insolvent in the bankruptcy sense (R. 314). It should also be noted that, except for the year 1929, Consolidated showed no net operating profit, after bond interest and provision for depreciation and depletion, in any year during the period from its organization to the date of the hearings on the plan (R. 190-191). Considering the results of operations before bond interest but after depreciation and depletion, Consolidated had a loss of \$1,282,388 for the eight and one-half years from April 1, 1929, the effective date of the operating agreement, to September 30, 1937 (R. 183-191). Except for five quarterly dividends in 1925 and 1931 on the preferred stock of

Consolidated, no dividends have been paid on either its preferred or common stock (R. 240, 280).

The Plan.—The District Court accepted the conclusion of the parties, including the bondholders' committees, that it was necessary and desirable to maintain operations of the three companies on a unified basis (R. 226, 241-242, 244). Accordingly, the plan of reorganization, filed for all three companies, provides for the formation of a single corporation to acquire all the properties of the companies (R. 26). The securities of the new corporation are to be distributed to existing claimants as follows: Union and Consumers bondholders will receive 50 percent of the principal amounts of their claims in 5 percent cumulative income bonds, secured by a mortgage on all of the property of the new corporation, and 50 percent in 5 percent \$50 par value preferred stock. Thus, Union bondholders, for their claims of \$2,280,555, will receive .\$938,500 of new income bonds and the same amount of new preferred stock, and Consumers bondholders, for their claims of \$1,358,715, will receive \$568,500 of new income bonds and the same amount of new preferred stock (R. 27-30). These securities will constitute all of the new bonds and preferred stock to be issued.

The new income bonds, which will mature in twenty years, will bear interest at the rate of 5 percent if earned, and cumulative if not paid (R. 35, 42–43). The new preferred stock will carry a dividend of 5 percent per annum, noncumulative

until the retirement of the bonds except to the extent that net income is available therefor, and thereafter cumulative (R. 47). In addition, each share of new preferred stock will carry with it a warrant for the purchase of two shares of new \$2 par value common stock at prices ranging from \$2 per share within six months after issuance to \$6 per share during the fifth year after issuance (R. 28–30). No further recognition is given to the old bondholders for the principal and interest of their claims.

The preferred stockholders of Consolidated will receive one share of the new common stock for each share of the old preferred, a total of 285,947 shares of the new common (R. 27, 31). A warrant to purchase one share of the new common at \$1 within three months after issuance will be issued to the common stockholders of Consolidated for each five shares of the old common (R. 31). An aggregate of 79,491 shares of new common will be authorized and reserved for the exercise of the

The bonds and preferred stock to be issued to Union and Consumers bondholders, respectively, will be in separate series designated as Series U and Series C (R. 28–30, 40–41). The net income of the new corporation will be divided into two equal parts. Each part will be used to pay successively, with respect to the bonds and preferred stock of each series, interest on the bonds, sinking fund payments thereon, dividends on the preferred stock, and sinking fund payments for the preferred; any income remaining thereafter will be available for general corporate purposes (R. 33–34). Proceeds from the sale of nonessential properties will be used to retire the bonds and preferred stock (R. 43).

warrants issued to the old common stockholders; an additional 60,280 shares of new common will be authorized and reserved for the exercise of the warrants to be attached to the new preferred stock (R. 27). The total number of shares authorized to be issued, therefore, is 425,718 (R. 27).

The new preferred stock, to be issued to the old bondholders, will be entitled to elect four of the nine directors of the new corporation (R. 49). The remaining five directors will be elected by the new common stock (R. 49), the majority of which will be held by the old preferred stockholders of Consolidated even if all warrants are exercised. Only upon the failure to pay interest on the bonds in prescribed amounts will control of the new company pass to the old bondholders (R. 49).

The plan further provides for the cancellation of \$102,500 face amount of Union bonds and \$63,500 face amount of Consumers bonds held by Consolidated (R. 55). The stock of the subsidiaries held by Consolidated and the net claims of the subsidiaries against Consolidated aggregating over \$5,000,000 will also be cancelled.

None of the companies is indebted to general creditors in any significant amount (R. 248, 314–319) and the plan provides that the claims of such creditors shall either be paid in full or assumed by the new corporation (R. 32-33).

The treatment to be accorded existing securities under the plan is shown in tabular form below.

The table does not list the warrants to be issued or the intercompany claims to be cancelled.

	Proposed new securities					
Existing securities		First mtze. 5% cum. income bonds	Pid. stock \$50 par value 5% non-cum.		Coramon stock, \$2 par value	
polyments a visitalitimosom retinant designari como combina allebido polar deligido como con escución como com deligido de visitalitimosom retinant deligido como combina deligido polar deligido como con escución como como como como como como como com					. 4.	Par
Union 1st Mortgage 6th Serial Bonds Accrued Interest to April 1,	\$1, 877, 000, 00	\$938, 500	Shares i8,770	Par value \$938, 500	Shares	1
1937 Consumers 1st Mortgage 6%	\$403, 555.00					
Bonds accrued Interest to April 1,	\$1, 137, 000. 00	568, 500	-11,370	56%, 500		•
1937 ¹ . Consolidated \$1.75 Cum. Pfd., no par yalue, liquidation	\$221,715.00					
preference, \$25.2 Consolidated Commen, no	· 2 285, 947				285, 94	\$571, 894
par value	3 397, 455		• • • • • • •			
Total		1, 507, 000 ,	30, 140	1, 507, 000	285, 947	. 571, 894

¹ The proposed effective date of the plan.

Disposition of the Plan in the Lower Courts.—
The plan was confirmed by the District Court on September 8, 1938 (R. 231). Respondent E. Blois DuBois, a holder of both Union and Consumers bonds, objected to the plan and appealed from the order of confirmation (R. 349). On November 4, 1939, the court below rendered an opinion affirming the action of the District Court (see 107 F. (2d) 96, advance sheets). After the decision of this Court in Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, the court below granted a petition for rehearing and ordered its

³ The liquidating preference of these shares aggregates \$7,148,675, executive of accumulated and unpaid dividends.

[&]amp; Shares. .

first opinion withdrawn (R. 363-364). Upon the rehearing, the order of confirmation was reversed (R. 365, 381, 382).

Petitioners in this Court.—The petitioners in No. 400 are Consolidated and a committee of its preferred stockholders. They seek to have the decree of the court below reversed and the order of the District Court confirming the plan affirmed. The petitioners in No. 444 are the protective committees for the Union and Consumers bondholders. They seek reversal of the decree below only in so far as it holds the plan to be unfair and inequitable to the bondholders by reason of failure to allot them full priority in the particular assets subject to their respective liens.

Participation of the Securities and Exchange Commission.—The Securities and Exchange Commission first appeared in the present case by filing a brief amicus curiae upon the rehearing in the court below. After entry of the decree of reversal, the Commission filed a notice of appearance in the District Court pursuant to Sections 208 and 276. c. (2) of Chapter X of the Bankruptcy Act, as amended. The Commission is now participating as a party in the proceeding before the District Court.

SUMMARY OF ARGUMENT

1. The findings of the District Court are inadequate to permit a determination that any plan of

reorganization for the three companies here involved is fair and equitable. The court left undetermined the validity and value of the claims, aggregating over \$5,000,000, of Union and Consumers against Consolidated, and no precise findings were made as to the value of the assets of any of the companies, even apart from these claims, or of the enterprise as a whole. An examination of the record reveals that no adequate valuation testimony was introduced upon which the necessary findings could properly have been made. Accordingly, the court below was clearly correct in reversing the order of confirmation and directing that a further investigation of value be made.

2. Even on the present record, however, it is clear that the plan of reorganization now before the Court is unfair and inequitable to the Union and Consumers bondholders. On the basis of petitioners' valuation figures, the value of the assets subject to the liens of the bondholders is only about \$300,000 less than the face amount of the bonds outstanding in the hands of the public, plus interest accrued to April 1, 1937. Yet the face amount of the new income bonds and preferred stock which the bondholders are to receive is \$625,000 less than their admitted claims. Moreover, these new securities are of a definitely inferior grade. There is no reasonable prospect that these securities will be of a value equivalent to

their face amount upon termination of the proceedings or reasonably soon thereafter, and they cannot, therefore, be regarded as satisfying even *pro tanto* the bondholders' claims.

Petitioners attempt to justify the participation in the plan of Consolidated's preferred stockholders, despite the reduction and impairment of the rights of the bondholders, on the ground that Consolidated has assets worth \$859,000 which, they contend, are not subject to the bondholders' claims. The answer is twofold. In the first place, the record clearly establishes that Union and Consumers have valid and enforceable contractural 'claims against Consolidated which must be satisfied out of Consolidated's assets before its stockholders may participate at all, and that these claims are more than sufficient in amount to provide full compensation for the bondholders. In the second place, in view of the intermingling of the properties by Consolidated itself and the appropriation of the income thereof by Consolidated under the operating agreement, the whole enterprise must neces- . sarily be regarded as a unit. So regarded, it is plain that the claims of the bondholders must receive full priority out of all the assets owned by the enterprise before any interest therein is accorded to the stockholders.

3. Although, for the reasons stated above, we believe that the court below correctly reversed the order of the District Court confirming the plan,

we believe the court erred in its further holding that the plan is unfair and inequitable as a matter of law simply because it permits Union's bondholders to share in Consumers' assets and Consumers' bondholders to share in Union's assets. This holding was apparently founded on the view that a class of claimants with a lien on particular properties must receive fully compensatory treatment out of those properties and may not as a matter of law receive less than fully compensatory treatment out of those properties even though it is adequately compensated with an interest in other properties., This ruling, unless reversed, will. make impossible the formulation and consummation of a plan of reorganization which provides for unified operation of all the properties by a new corporation and for the satisfaction of the claims of the bondaolders through their participation in securities covering all the properties of the new corporation.

The decision in Case v. Los Angeles Lumber Co., Ltd., 308 U. S. 106, furnishes no support for the decision below in this regard. The rule of full priority is not violated merely by the fact that lienors surrender their priority to, or share it with, persons who contribute new funds to the enterprise. The present situation is similar, except that the contribution made by each group of lienors for the right to share in the assets contributed by the other group is made in property rather than in money.

ARGUMENT

T

THE DECISION OF THE COURT BELOW AND THE POSITION OF THE COMMISSION WITH RESPECT THERETO

Upon the rehearing in the court below, the Commission contended that the order of confirmation should be reversed because the plan of reorganization failed to meet the requirements of the rule enunciated in Case v. Los Angeles Lumber Products Co., Ltd., supra. The basis of the contention was that the plan did not provide fully compensatory treatment for the bondholders of Union and Consumers to the extent of the value of the assets subject to their claims, and yet allowed participation in those assets by the preferred stockholders of Consolidated whose position was junior te that of the bondholders. The court below held that the findings of the District Court were inadequate to allow final disposition of this contention, since the findings failed to show the value of disputed claims, aggregating over \$5,000,000, which Union and Consumers had against Consolidated. Moreover, the court held that judgment in this matter was hampered by the inadequacy and inconsistency of the findings with respect to the values of the properties subject to the lien of the bonds issued by Union and Consumers, and the value of any assets of Consolidated (R. 373-374, 382-383).

. The court might have stopped at this point and remanded the case to the District Court for further

findings. Instead of so doing, however, it simply observed (R. 374) that "since the plan proposed, we think, is unfair as a matter of law for reasons hereafter stated, we assume that both matters mentioned will be satisfactorily disposed of upon remand of the cause."

The reasons that the court believed the plan to be unfair as a matter of law were then stated by it in the following words (R. 377):

The trial court found that the property of . Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given. an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., supra. Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan, some of · which appear to be sound.

As we understand this portion of the opinion, the court below held that a class of claimants with a lien on particular properties must receive fully compensatory treatment out of those properties and may not as a matter of law receive less than fully compensatory treatment out of those properties even though it is adequately compensated with an interest in properties subject to the lien of another class of claimants.

⁵ This portion of the opinion is not entirely clear insofar as it declares the plan to be unfair to the bondholders because the preferred stockholders of Consolidated are given an interest in the assets securing the bonds. The court may have meant simply that the participation of the preferred stockholders in the plan was unfair to the bondholders because the bondholders had not received full priority; it may have meant, on the other hand, that the preferred stockholders should not have been allowed to share in the particular assets securing the bonds because the bondholders had not received fully compensatory treatment out of those assets.

But whatever the court may have meant by its reference to the preferred stockholders, it plainly intended to an nounce the principle of law stated in the text insofar as it held the plan unfair as a matter of law because each group of bondholders was required to share its security with the other group of bondholders. No other construction can be given to the words (R. 377) that "the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders * * * are given an interest in Union's property" and that "Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders * given an interest in Consumers' property.". That the mention of the interest given to each group of bondholders in the assets of the other group was not inadvertent is shown by the fact that the court below denied a motion, joined in by all of the parties, to modify this paragraph of the opinion

This holding we believe to be plainly erroneous for the reasons stated in Point IV, infra, pp. 47-52. Consequently, although we urge affirmance of the decree below, we also urge that the mandate of this Court should issue in such form as to permit the District Court to proceed further in the reorganization without regard to this holding.

The grounds upon which we urge affirmance of the decree below are: (1) that the findings of the District Court on the question of valuation are insufficient to permit a determination that any plan of reorganization for these companies is fair and equitable; and (2) that, even on the basis of the present record, it is evident that this plan of reorganization is unfair and inequitable to the Union and Consumers bondholders.

·II

THE FINDINGS OF THE DISTRICT COURT ARE INSUFFI-CIENT TO PERMIT DETERMINATION THAT ANY PLAN OF REORGANIZATION IS FAIR AND EQUITABLE

It is manifest, we believe, that before any plan of reorganization for the three companies here involved can properly be confirmed as fair and equitable, there must be some adequate determination of the value of the enterprise as a whole and of the assets belonging to each company. If Censolidated has no assets which are not subject to a valid claim

so as to delete references to the interest given to each group of bondholders in the property securing the claims of the other group of bondholders (R. 382-383).

of Union and Consumers, Consolidated's stockholders are obviously not entitled to participate in the reorganization unless Consolidated, as holder of all the stock of Union and Consumers, has an equity in their assets remaining after full priority is accorded to the Union and Consumers bondholders. The existence or nonexistence of such equity cannot be determined without ascertaining the value of the business as a going concern. . Similarly, if Consolidated has assets which are not subject to a valid claim of Union and Consumers, those assets must be valued in order to determine the extent to which their existence may justify participation in any plan by Consolidated's stockholders. And in either situation, it is necessary to value Union's and Consumers' assets in order to determine whether the treatment accorded to the bondholders of each company is fair to them inter sese.

As the court below held, the findings of the District Court are totally inadequate on these fundamental issues. Not only did the court leave undetermined the validity and value of claims, aggregating over \$5,000,000, which Union and Consumers have against Consolidated, but it made no findings concerning the value of the assets of the companies apart from these claims. And examination of the record reveals that no adequate valuation testimony was introduced upon which the necessary findings could properly have been made.

1. With respect to Union and Consumers, the District Court found merely that the present fair

value of all of the assets "admittedly" subject to the trust indentures securing their respective bond issues "is insufficient to pay the par value of the bonds, plus accrued interest" (R. 245). This finding, as the court below pointed out (R. 374), is not easy to reconcile with the further finding that the assets of the three companies have been so commingled that identification of the assets belonging to each is impossible (R. 241-242). Moreover, the District Court failed to find the extent to which the bonded indebtedness of each company, plus accrued interest, exceeded the value of the mortgaged assets, and it failed to determine whether or not Union and Consumers had any assets not subject to the trust indentures, and, if so, the value of such assets. Had such a determination been made, as it should have been, it would necessarily have involved a determination of the validity and value of the claims of Union and Consumers against Consolidated. .

2. So far as Consolidated is concerned, there is no finding whatever as to the value, if any, of its assets. Instead of making such a determination, the District Court found only that the value of the assets of all three companies, if operated as a unit, was in excess of the total bonded indebtedness, plus accrued interest, although not in excess of the bonded indebtedness, plus accrued interest, and the liquidation preferences on Consolidated's preferred stock, including accrued divi-

dends (R. 245). It should be noted that this general finding of the solvency of the enterprise as a whole is inconsistent with the consolidated balance sheet filed by Consolidated itself (R. 314), which shows the enterprise to be insolvent. In any event, a mere conclusion that the enterprise as a whole is worth more than the amount of the mortgage debts is not sufficient; a more precise determination of value must be made so that a conclusion may be reached as to the proper allocation of securities between bondholders and stockholders.

3. In our view, the present record does not contain sufficient evidence upon which adequate valuation findings could have been made. Three valuation witnesses were called; of these three witnesses, referred to by the petitioners as "independent" (Br. 19), two are present officers of Consolidated, and the other is a former employee of Union (R, 279, 290-291). It is apparent that all three-reached their conclusions as to value on the basis of physical valuations of the assets (R. 281-282, 290, 291-292).

The record contains no testimony concerning the estimated prospective earnings of the enterprise and no attempt was made to value the enterprise by the capitalization of such prospective earnings. The absence of such evidence, in and

⁶ Rogers testified that Union could earn interest on a valuation of \$7,000,000, although the present value of its physical properties was \$2,318,000. As to this \$7,000,000 figure, the Special Master said, "The evidence does not warrant a finding of this valuation" (R. 151).

of itself, makes the record inadequate for any determination as to the fairness of any plan that may be presented. This is so because the proper method for estimating the value of any going concern is to capitalize prospective earnings at a rate appropriate in view of the risks inherent in the business. This was recently recognized by this Court in Palmer v. Connecticut Ry. & Lighting Co., No. 38, this Term, decided January 6, 1941; it has similarly been recognized by the lower federal courts and by the leading text writers on valuation problems.

The necessity for a thorough inquiry into the prospective earning power of the enterprise involved in the present case is emphasized by its poor earnings record in the past, which the valuation witnesses appear to have entirely disregarded. The record shows that the business has lost money in every year from 1930 through 1937 after interest and allowance for depreciation and depletion expense and taxes. Considering the results of operation before bond interest but after allowance for depreciation and depletion, the business lost \$1,282,388 in the eight and one-half years from

In re Wickwire Spenser Steel Co., 12 F. Supp. 528, 533 (W. D. N. Y.); In re Consolidation Coal Co., 11 F. Supp. 594, 597 (Md.); In re Pittsburgh Hotels Corporation, 17 F. Supp. 949, 951 (W. D. Pa.); Bonbright, Valuation of Property (1937), Vol. 2, pp. 875-881, 883-893; Dewing, The Financial Policy of Corporations (3d ed. 1934), p. 140; Finletter, The Law of Bankruptcy Reorganization (1939), pp. 557-568; cf. Atlanta, B. & C. R. Co. v. United States, 296 U. S. 33, 38.

April 1, 1929 to September 30, 1937 (R. 183–191). In the light of this poor earnings record, it seems difficult to justify the value of over \$4,000,000 ascribed to the properties by petitioners, on the basis of the testimony of the valuation witnesses (Pet. Br., pp. 26–27, 30–31); to justify such a valuation on the basis of a capitalization of earnings, the enterprise would have to have an operating profit, after all expenses except bond interest, of over \$400,000 a year, even assuming the application of a 10% capitalization rate.

4. In this state of the record, we believe that the court below correctly held that "precise findings as to values must be made" for "a complete determination as to the fairness of any plan' (R. 380). We also believe that the court below properly left to the discretion of the District Court the question of whether an "appraisal" of the properties should be made for this purpose (R. 380). Certainly there is no place in most reorganization cases for an "appraisal" of a going concern consisting merely of the sum of values assigned to individual assets of the concern without regard to the earning power of the enterprise as a whole. But "appraisal" in the sense of a critical consideration of the nature and condition of these assets is, of course, an essential part of an enterprise valuation based on prospective earnings. In our view, no

^{*} It is impossible in the present state of the record to determine what allowances for depreciation and depletion must be made in the future.

adequate judgment may be formed on the present record as to the degree of inquiry necessary into the nature and condition of the assets in this case in connection with a valuation based on earnings, and the question of an "appraisal" in this respect was, therefore, properly left for decision by the District Court.

III

THE PLAN OF REORGANIZATION NOW BEFORE THE COURT
IS UNFAIR TO THE BONDHOLDERS OF UNION AND
CONSUMERS

Although, for the reasons stated above, we believe the court below correctly held that the findings of the District Court as to the valuation of the properties are inadequate affirmatively to establish the fairness of any plan of reorganization that might be proposed for these companies, we think it plain, even on the basis of the present record, that this plan of reorganization does not comply with the requirements of the statute.

There would remain also to be considered in the District Court an appropriate formula for the ascertainment and valuation of the respective assets of Union and Consumers, in order to determine the fairness of the treatment afforded their bondholders inter sese. Unlike the valuation of the enterprise as a whole, the valuation of Union and Consumers primarily on an earnings, basis presents difficulties because of the manner in which these companies have been operated since 1929 (R. 238), the commingling of their assets, and the fact they have no individual earnings record.

A. THE TREATMENT ACCORDED TO BONDHOLDERS UNDER THE PLAN

In order to make the following discussion specific we shall use the values for tangible assets used in petitioners' brief. Based upon the average of the estimates contained in the testimony, petitioners treat Union's assets as worth \$2,202,733, Consumers' assets as worth \$1,151,033 and Consolidated's tangible assets (including all current assets of the enterprise) as worth \$859,784 (Br. pp. 26-27, 30-31). This gives a total value for the enterprise of approximately \$4,213,000.10 We do not concede by using these figures that the record contains satisfactory evidence from which such values can be found to exist. We emphasize, too, that the following discussion of the unfairness of the plan does not depend on any exact assumptions as to value, for the unfairness rests in the inadequacy of the securities given to the bond-

^{\$500,000} ascribed by Mitchell to the good will of the enterprise (R. 282). This figure appears to be wholly arbitrary, particularly in the light of the earnings record (see pp. 11, 27, supra), the fact that only five quarterly dividends on the preferred stock were ever paid (in 1929 and 1931), that no dividends have ever been paid on the common stock, and that the bonds of the subsidiaries have been in default since 1933 and 1934. In any event, for the reasons discussed below at pages 43 44, we believe that, if good will is to be separately included as an element of value in determining the value of the properties, it should be apportioned among the several companies constituting the enterprise rather than be considered as an asset of Consolidated alone. See in this connection R. 147-148.

holders. Such inadequacy would exist irrespective of the precise values which the assets of any of the companies may be found to have.

Against the assets thus valued at \$4,213,000 stand prior claims of the bondholders aggregating \$3,-640,000, representing the principal and interest of their claims as of April 1, 1937. The interest elaims, amounting to \$625,000 or about 17% of the bondholders' total claims, are entitled to the same priority as the principal. In re Banclay Park Corp., 90 F. (2d) 595 (C. C. A. 2d); et. American Iron and Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261, 266-267; Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106. All of the bondholders' claims are now due and They constitute first liens against all of the assets except those of Consolidated, which on petitioners' assumptions are about 20% of the assets of the combined enterprise. The bonds bear fixed interest rates of 6% and afford the bondholders the customary remedies in the event of default.

In exchange for their claims of \$3,640,000, the plan offers the bondholders new income bonds and preferred stock of an aggregate face amount of only \$3,015,000. Thus, even if the new securities be considered as worth their face amount, they are inadequate by \$625,000 to satisfy the bondholders' admitted claims. This is the precise amount of the accrued interest obligation, the effect of the plan being to cancel this obligation.

Not only do the bondholders lose their interest claim, but the new securities offered them are of a definitely inferior grade. The new bonds and preferred stock will bear interest and dividend rates, respectively, at the reduced rate of 5% as compared with the 6% rate on the present bonds. new bonds will be on an income basis with maturity extended for 20 years. The definition of default is extremely lenient and the remedies upon default are severely restricted (R. 39, 42-43). preferred stock, of course, will have no maturity. It will be on a noncumulative income basis, except to the extent of available earnings, until all bonds are retired. This means, of course, that a distribution to common stockholders may be made in any year, after all charges on the preferred stock have. been met for that year, even though dividends had not been earned and paid on the preferred stock in prior years.

As further emphasizing the obvious failure of these securities to constitute full compensation for the creditors' claims even to the extent of their face amount, it should be noted that the securities issued to the bondholders do not carry with them control of the new company. Consolidated's preferred stockholders, who receive all of the new common stock initially to be issued, will retain control even though all the proposed warrants are exertised. Only in the event of a failure to pay certain minima of interest on the new bonds will control pass to the bondholders. (R. 49.)

The cumulative effect of the foregoing characteristics of the new securities compels the condusion that they do not constitute full compensation to the bondholders even to the extent of their face amount. On the contrary, there is clainly no reasonable prospect that, upon termination of the reorganization or reasonably soon thereafter, these securities will be of a value equivalent to their face amount, and, consequently, they cannot be regarded as satisfying even pro tanto the

The warrants attached to the new preferred

ondholders' claims.

tock are not compensating factors of consequence. To make the bondholders whole merely for the ancellation of their accrued interest of \$625,000, he 60,280 shares of new common to which they vould be entitled upon exercise of the warrants vould have to attain a value exceeding the warant price by \$625,000. This would require values anging from \$12.40 per share (if the warrants vere exercised within the first six months) to 316.40 per share (if the warrants were exercised luring the fifth year after issuance). On the ther hand, petitioners' own estimates, which asume a maximum value of about \$1,300,000 for the quity in the new company after deducting the face mount of the new bonds and preferred stock, ndicate a value per share of approximately 4.50. It is plain, therefore, that the warrants epresent no material measure of compensatory

reatment for the bondholders.

In this connection it should be noted that Consolidated's common stockholders, who were found to have no equity whatsoever (R. 245), are given warrants to purchase the same class of stock as the bondholders, and at a lower price. Thus every exercise of a warrant by a bondholder would immediately enhance the book value of new common stock purchased by the old common stockholders, and conversely, every exercise of a warrant by the old common stockholders would dilute the book value of new common stockholders would dilute the book value of new common stock purchased by the old bondholders.¹¹

The foregoing discussion demonstrates the drastic reduction and impairment of the bondholders' claims contemplated by the plan and the resulting benefit to the Consolidated preferred stockholders. The bondholders receive nothing for their interest claims, and for their principal claims they receive inferior securities which are not full compensation

The very issuance of warrants to the common stockholders makes the plan unfair as a matter of law, in the absence of circumstances making necessary the tender to them of a right to subscribe. Kansas City Terminal R. Co. v. Central Union Trust Co., 271 U. S. 445, 455–456; Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, 117, 121–122. The allotment of subscription warrants to a class of common stock for which there is no equity, in the absence of the necessary justification, violates the "fair and equitable" standard. Cf. In re Utilities Power and Light Corp., 29 F. Supp. 763 (N. D. III.), appeal dismissed, C. G. A. 7th, March 9, 1940; In re Chicago Great Western Railroad Co., 29 F. Supp. 149 (N. D. III.); see also In re National Food Products Corporation., 23 F. Supp. 979 (D. Md.).

therefor. It is not our position that under a reorganization plan bondholders cannot be given securities with characteristics inferior to those of the securities formerly held. Feasibility may so require, and the rule of full priority does not render a feasible reorganization impossible. the extent that the requirements of a financially sound reorganization make necessary the cutting down of bondholders' rights, adequate compensation must be given before junior classes may be permitted to participate. Cf. Standard Gas and Electric Co. v. Deep Rock Oil Corp. (C. C. A. 10th), decided January 13, 1941. Stated otherwise, the rule of full compensation cannot be satisfied merely by the issuance of securities in the appropriate face amount; but, if junior classes are to participate, the package of new securities which is offered to the bondholders must possess such protective provisions, security and rate of return as to make the securities of a value equal to the bondholders' claims.

B. THE TREATMENT ACCORDED TO THE BONDHOLDERS IS NOT FAIR AND EQUITABLE

Petitioners attempt to justify the participation in the plan of Consolidated's preferred stockholders, despite the reduction and impairment of the rights of Union's and Consumers' bondholders, on the ground that Consolidated has assets worth \$859,000 which, they contend, are not subject to the

bondholders' claims.12 The answer is twofold. In the first place, the record clearly establishes that Union and Consumers have valid and enforceable contractual claims against Consolidated which must be satisfied out of Consolidated's assets before its stockholders may participate at all. In the second place, in view of the intermingling of the properties of the three companies by Consolidated itself and the appropriation of the income thereof by Consolidated under the operating agreement, we believe that the whole enterprise must necessarily be regarded as a unit and that the claims of the bondholders must receive full priority out of all the assets owned by the enterprise before any interest therein is accorded the stockholders. When such right to full priority is recognized, it is clear that the plan is unfair to the bondholders.

1. The claims of Union and Consumers against Consolidated.—The books of Consolidated, as well as those of Union and Consumers, show an indebtedness of Consolidated to its subsidiaries of over \$5,000,000. The books of the subsidiaries show a

¹² Petitioners advanced the additional contention in the court below and in their petition for a writ of certiorari that the rule of full priority enunciated in Case v. Los Angeles Lumber Co., Ltd., 308 U. S. 106, is not applicable to a solvent enterprise. This contention has now apparently been abandoned. For the reasons pointed out in the Memorandum for the Securities and Exchange Commission as Amicus Curiae, filed in connection with the petition for certiorari, the contention is plainly without merit.

total net claim of \$5,138,141.34, of which \$291,331.69 represents net current receivables, exclusive of depreciation, depletion, and amortization, and the remainder represents accumulated depreciation, depletion, and amortization (R. 317–319). Consolidated's own balance sheet shows a net liability to its subsidiaries of \$5,321,998.37, of which \$256,598.56 represents net current liabilities (R. 316). These records have been kept in accordance with the requirements of the original operating agreement (R. 236–237, 280–281, 299).

As we understand petitioners' argument, no contention is advanced that Consumers and Union do not have a valid claim against Consolidated to the extent, at least, of the net current liabilities, aggregating more than \$250,000, shown on Consolidated's books. Nor can there be any valid contention that Consolidated is not under some liability with respect to the depreciation, depletion, and amortization items. Even overlooking the serious doubts as to the validity of the modification agreement and treating that agreement as determining the rights of the parties, Consolidated is liable to its subsidiaries for depreciation, depletion, and amortization in amounts to be determined by retroactive appraisals made after termination of the operating agreement. The modification agreement expired

¹⁸ The variations in the figures shown by the books of Union and Consumers and of Consolidated may possibly be explained by the inclusion in the latter of accounts with other subsidiaries of Consolidated (R. 286–287, 316).

pursuant to its terms before the plan of reorganization in this case was confirmed. The record does not show that the one-year notice required for renewal (R. 180-181) was ever given. Thus it would have been entirely possible for the appraisal to have been made. Certainly Consolidated, which has been in possession of the subsidiaries' properties throughout the proceedings and controlled their directorates (R. 236), cannot advance the failure to have the appraisal made, and hence the extent of its liability determined, as justification for entirely negating liability.

Petitioners argue that there is no present claim by the subsidiaries against Consolidated, because under the modification no claim exists until the termination of the operating agreement. But the operating agreement, as modified, terminated on February 16, 1938. Although petitioners speak of a right of renewal (Brief, p. 28), the record does not show the exercise of the right, nor do petitioners assert that it was exercised.

Petitioners argue further that even after the claim is determined the subsidiaries cannot reach the assets of Consolidated, because Consolidated has the option to pay the claim in ten annual installments. But this option relates only to the amounts due for depreciation (R. 178-9), not to the \$250,000 or more due on current account. Moreover, the fact that payment of the remainder of the debt may be made in installments (which

bear interest) (R. 179) does not affect the provability of the debt under the broad definition of "claims" and "creditors" in Section 77B (b). Claims are there defined to include "debts, securities, other than stock, liens, or other interests of whatever character"; creditors are defined to include all holders of such claims "including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act." Compare Section 63 (a) (1), which permits proof of fixed liabilities "whether then payable or not," and Section 63 (a) (4), which permits proof of debts on open account, or on a contract express or implied, with no limitation as to maturity. The proof would be made by the trustees of the subsidiaries. Bankruptcy Act, Sections 57 (m), 77B (k).

Since liability does in fact exist, it is immaterial whether the amount due is around \$5,000,000, as the books show, or some lesser amount determined on the basis of an appraisal made under the modification agreement. In whatever amount liability exists, to that extent it subjects the assets of Consolidated to the prior claims of the bondholders. According to petitioners' valuation figures, the bondholders' claims held by the public exceed the value of the assets securing their liens by only \$300,000. To this may be added the \$200,000, principal and interest, of Union and Consumers bonds which Consolidated owns, and

which for present purposes we may assume constitutes a valid claim of Consolidated against Union and Consumers. It is therefore necessary to show liability only in the amount of \$500,000 from Consolidated to the subsidiaries in order to establish the bondholders' right to full compensation for the face amount of their claims. Of this \$500,000, at least \$250,000 is due on current accounts. Petitioners are therefore required to maintain that the liability for depreciation, depletion, and amortization, set out on the books of the companies at more than \$5,000,000, in fact amounts to no more than \$250,000. The record furnishes no support for any such proposition. To the contrary, as pointed out in respondent's brief (p. 19), even accepting the modification agreement as valid, depreciation, depletion, and amortization charges would be approximately \$1,250,000 on the basis of a \$3,300,000 valuation for Union's and Consumers' properties.

Petitioners seek to avoid the force of this position by contending that the provisions of the plan constitute a compromise of Consolidated's liability. The contention is completely without merit. It was first advanced upon the rehearing in the court below after the decision of this Court in the Los Angeles Lumber case; prior to that time, neither in the District Court nor in the Circuit Court of Appeals, did petitioners urge that participation in the plan by Consolidated's stockholders was to be

justified on the basis of a compromise. Upon the rehearing, the Circuit Court of Appeals expressly refused to treat the plan as embodying such a compromise, stating that no plan of reorganization for the companies could be held to be fair and equitable "until the claim is settled, either voluntarily or by litigation" (R. 374).

Certainly, if the plan was in fact intended as a compromise of liability, there is a complete failure of proof to that effect. A plan embodying a compromise should be presented to the court in such fashion as to indicate clearly the nature of the proposed compromise, the extent to which liability is recognized, and the allocation of securities based on the settlement. In the present case these standards have not been met; the alleged compromise has been presented to the court with its terms so obscured as not to afford to the court an opportunity to exercise the "informed, independent. judgment" which the statute requires. National Sureby Co. v. Coriell, 289 U. S. 426, 436; Case v. Los Angeles Lumber Products Co., Ltd., supra, at 114-115.

But apart from these considerations, it is plain that any compromise in fact embodied in this plan of reorganization would have to be rejected on the merits. In the Los Angeles Lumber case, this Court recognized that although conflicting claims to specific assets might sometimes be settled, such settlement would be "in the discretion of the

court" (308 U.S. at 130). Approval of this plan on the basis of the asserted compromise would, we submit, be a gross abuse of discretion.

As pointed out above, on the basis of petitioners' own valuation figures, a liability of only \$500,000 on the part of Consolidated would have to be shown in order to establish the right of the bondholders to fully compensatory treatment for the face amount of their claims. Of this \$500,000, at least \$250,000 is due on current accounts. Consequently, in order to support the plan on the basis of an alleged compromise, petitioners must establish that Consolidated has such substantial defenses against the claims of the subidiaries for depreciation, depletion, and amortization as to justify settlement of those claims, carried on Consolidated's own books at more than \$5,000,000, for less than \$250,000. In this respect, petitioners case is entirely deficient; the defenses they assert for Consolidated are flimsy, if not captious.

The first of these alleged defenses is that, although Consolidated may be liable to Union and Consumers, it is not liable to their bondholders because of the provision in the operating agreement that that agreement was not made for the benefit of any third person. But the question at this point is not whether the bondholders may directly enforce the liability against Consolidated; the question is only whether and to what extent that liability exists. To the extent that it does exist, the claims of Union and Consumers against

Consolidated are valuable assets of the subsidiaries which are subject to the claims of the bondholders. The normal procedure for adjudication of the existence and amount of Consolidated's. liability would be for trustees of the subsidiaries to file claims against Consolidated's estate and for the bankruptcy court to decide the validity and amount of those claims. Section 57 (m): Section 77B (k). Cf. Pepper v. Litton, 308 U. S. 295. Contrary to petitioners' contention (Br. 29), there would be no necessity for foreclosure of the trust indentures under the law of California. The effect of the enforcement of the claim under the operating agreement would be to draw the assets of Consolidated into the subsidiaries' estates. The bondholders could then either have their security valued under section 57 (h) of the Bankruptcy Act (see sec. 77B (b)) and prove a general claim for the deficiency, or they could prove their entire claims as general claims, waiving their security. Gilbert's Collier on Bankrupton (4th ed., 1937) sec. 1043. In either case, since the bondholders are the only significant creditors of Union and Consumers (R. 248, 317-319), their claims would have to be satisfied in full out of any assets in the estates before Consolidated, as stockholder of the subsidiaries, could share.

The other alleged justification for the compromise is that without the compromise the bondholders would be faced with extensive procedural obstacles before they could realize upon the claims.

If this means that the compromise avoids foreclosure and sale, the answer is, as we have stated, that no foreclosure is necessary. If it means that the compromise avoids obstructive litigation, the answer is that a compromise for this purpose alone is not justified. In the *Los Angeles Lumber* case, this Court stated (pp. 129-130):

The conclusion of the District Court that avoidance of litigation with the stockholders gave validity to their claim for recognition in the plan involves a misconception of the duties and responsibilities of the court in these proceedings. Whatever might be the strategic or nuisance value of such parties outside of § 77B is irrelevant to the duties of the court in confirming or disapproving a plan under that section. In these proceedings there is no occasion for the court to yield to such pressures. If the priorities of creditors which the law protects are not to be diluted, it is the clear duty of the court to resist all such assertions.

We believe it is evident, therefore, that the asserted compromise is no justification for the participation in the plan by Consolidated's preferred stockholders, that sufficient (if not all) of Consolidated's assets are subject to the claims of Union and Consumers to provide fully compensatory treatment for the bondholders, and that consequently the failure of the plan to accord them such treatment renders the plan unfair and inequitable as a matter of law.

2. The intermingling of the assets by Consolidated—The assets allegedly belonging to Consolidated are subject to the claims of the bond-holders even apart from the contractual liability of Consolidated to Union and Consumers.

Under the operating agreement, Consolidated completely dominated the subsidiaries. It took possession of their properties and operated them in connection with its own as though all the properties were consolidated under a single ownership, and it commingled the assets of each so that separate identification thereof has become impossible. This commingling alone should throw upon Consolidated the burden of identifying its own assets in order to assert a claim to any. Union Naval Stores Co. v. United States, 240 U.S. 284, 291; The Idaho, 93 U. S. 575; Intermingled Cotton Cases, 92 U.S. 65; The Distilled Spirits, 11 Wall. 356. But Consolidated exerted its control over the subsidiaries to do more than commingle the assets. the one hand, it took possession of the subsidiaries' properties through the operating agreement and appropriated for itself all revenues from operations (R. 170-171), thus disabling the subsidiaries from performing the covenants of their indenture agreements, including particularly the interest, sinking fund and depreciation and depletion provisions. On the other hand, it violated its own covenant to supply the subsidiaries with the necessary funds to meet interest and sinking fund requirements (R. 167-168). In all respects, except for some bookkeeping purposes and the failure expressly to assume the subsidiaries' mortgage debts, it treated the enterprise as a unit and the subsidiaries' properties as its own.

Under these circumstances, we believe that the bankruptcy court, as a court of equity, is not required to pay regard to the separate corporate entities of the subsidiaries, which Consolidated itself has so consistently disregarded. Rather, it is called upon to treat the enterprise as though the properties of the different companies were actually held under single ownership by a corporation liable for all the debts. Compare Davis v. Alexander, 269 U. S. 114; Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., 54 Fed. 50 (C. C. A. 4th); Pennsylvania Canal Co. v. Brown, 235 Fed. 569 (C. C. A. 3d), certiorari denied, 242 U.S. 646; The Willem Van Driel, Sr., 252 Fed. 35 (C. C. A. 4th), certiorari denied, 248 U. S. 566; Trustees System Co. v. Payne, 65 F. (2d) 103 (C. C. A. 3d); Central Republic Bank & T.r. Co. v. Caldwell, 58 F. (2d) 721 (C. C. A. 8th).

So considered, of course, all the assets of the enterprise would be subject to the full amount of the bondholders' claims and the stockholders would be entitled to participate only to the extent of any remaining balance after fully compensatory provision is made for such claims. As we have shown, the plan fails to accord such full compensation to the bondholders.

Philadelphia Company v. Dipple, Nos. 242, 243, present Term, decided February 3, 1941, is not opposed to our contention. Although in that case this Court refused to disregard the corporate entities of various companies which had been operated as a unit, the relationship of the operating company to the underlying companies was there merely a creditor-debtor relationship under a lease, and not, as here, the relationship of parent and subsidiary. Moreover, as the Court pointed out, to ignore the separate corporate entities in the Dipple case might have affected the claims of other creditors adversely. No such consideration is involved in the present case.

No serious consideration need be given petitioners' contention (Br. pp. 30-31) that even if Consolidated's assets are subject to the debts, the plan is fair. As we have shown, the bondholders are not fully compensated for their prior claims, and no plan can be fair which does not provide full compensation. The assertion that the preferred stockholders are "contributing" 22% of the assets, ignores the fact that the assets must be applied to full compensation for the bondholders before the preferred stockholders can "contribute" the residue, and that in "accepting" a junior position the preferred stockholders give up nothing to which they are entitled. Moreover, petitioners' assertion rests on assumptions as to the value of the physical assets and the good will which we believe to be unsupported by satisfactory evidence (supra, pp. 26-28). Finally, we think it too clear for discussion that a plan which gives the preferred stock-holders "the right to elect only 5 out of 9 directors" (Pet. Br., p. 31) in return for their alleged 22% "contribution" unduly favors them and discriminates against the bondholders.

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A PLAN OF REORGANIZATION IS NOT UNFAIR AND IN-EQUITABLE AS A MATTER OF LAW BECAUSE CLASSES OF LIENHOLDERS ARE NOT GIVEN FULLY COMPENSA-TORY TREATMENT OUT OF THE PARTICULAR ASSETS SUBJECT TO THEIR RESPECTIVE LIENS, IF THEY ARE OTHERWISE GIVEN FULLY COMPENSATORY TREATMENT

The court below appears to have assumed that it was bound by the Los Angeles Lumber decision to hold that the plan of reorganization is unfair because it permits Union's bondholders to share in Consumer's assets and Consumer's bondholders to share in Union's assets. In other words, the court below apparently held that a class of claimants with a lien on particular properties must receive fully compensatory treatment out of those properties and may not as a matter of law receive less than fully compensatory treatment out of those properties even though it is adequately compensated with an interest in other properties. Such a ruling would make impossible the formulation and consummation of a plan of reorganization which provides for unified operation of all the properties by a new corporation and for the satisfaction of the claims of the bondholders through their participation in securities covering all of the properties of the new corporation. The proposal of such a plan here resulted largely from the manner in which the enterprise had been operated in the past and the conclusion of the parties, accepted by the Special Master and the District Court, that it was desirable that the separate liens be displaced and that the properties be operated as a unit in the future (R. 147–148, 261, 271). The Circuit Court of Appeals did not question this assumption.

We believe it plain that the Los Angeles Lumber decision does not require that a plan be held unfair and inequitable, as a matter of law, where bondholders receive less than full compensation out of the assets on which they have a lien, provided that they are adequately compensated for the loss of their prior claims by interests in other assets. The respondent has not questioned this. He expressly disclaims any contention to the contrary in his brief (p. 26).

Obviously, lienors may have to surrender their priority to, or share it with, persons who contribute new funds to the enterprise; in such case their compensation will consist in the acquisition by their corporation of the new funds. The present situation is similar, except that the contribution made by each group of lienholders for the right to share in the assets contributed by the other group is made in property rather than in money. Consumers' bondholders share their priority with per-

sons who contribute property necessary for the success of the enterprise as a whole, namely, the Union bondholders; the obverse is likewise true. So long as each group shares on an equitable basis in the securities of the combined enterprise, the plan of reorganization satisfies the requirements of the Los Angeles Lumber rule.

Furthermore, to read into the rule of the Los Angeles Lumber case a requirement that fully compensatory treatment for liens must be given out of the assets subject to the liens would have disastrous practical consequences. The elimination of divisional liens in the reorganization of corporations is frequently necessary and desirable. The problem arises in many industrial and railroad reor-

¹⁴ Because of the inadequacy of the record, we do not now express an opinion as to whether the plan of reorganization is fair in its treatment of the two groups of bondholders with respect to each other. We do, however, disagree with the suggestion of petitioners in No. 444 (Br., p. 18) and of petitioners in No. 400 (Br., p. 18) that no more precise findings of value than those which have been made are necessary in order to reach a conclusion as to the fairness of the treatment of the bondholders inter sese. The statement of petitioners in No. 444 (Br., p. 11) that new bonds of one issue equal in amount to the aggregate of the two old issues, and secured. by both properties, would be reasonably compensatory expressly assumes that the ratios of the values of the respective properties to the debts which they respectively secure are the same. The accuracy of this assumption cannot be determined without more precise conclusions as to the values of the respective properties.

ganizations where it is necessary or desirable to maintain unified operation of properties mortgaged to secure separate bond issues and where a simplified capital structure is required. The problem may also arise, even in the absence of liens, with respect to the treatment of the securities of any two or more corporations the properties of which should be combined in a single reorganized corporation.

Reorganization in some types of cases might be impossible under the holding of the court below. The reorganization provisions of the Bankruptcy Act, ¹⁵ and comparable provisions of other statutes, ¹⁶ require that a plan of reorganization be feasible as well as fair and equitable. If the holding of the court below is correct, a plan of reorganization

¹⁵ Sec. 77 (e), 11 U. S. C. § 205 (e); Sec. 77 B (f), 11
U. S. C. § 207 (f); Chapter X, Secs. 174 and 221 (2), 11
U. S. C. §§ 574 and 621 (2); Chapter XI, Sec. 366 (3), 11
U. S. C. § 766 (d); Chapter XII, Sec. 472 (3), 11 U. S. C. § 872 (3); Chapter XIII, Sec. 656 (3), 11 U. S. C. § 1056 (3).

¹⁶ Sections 11 (d) and 11 (e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. § 79k (d) and (e), authorize the Securities and Exchange Commission to approve, and to take steps to enforce, plans of reorganization of registered public-utility holding companies or their subsidiaries which must be both "fair and equitable" and "necessary to effectuate the provisions of subsection (b)." Among other things, Sec. 11 (b) requires the Commission to direct each registered holding company and subsidiary thereof to take steps to insure that its corporate structure is not unduly or unnecessarily complicated.

which fails to preserve priorities of separate lienors against the properties securing their respective claims cannot be fair. Yet in many cases any plan attempting to preserve separate liens would necessitate so complicated a capital structure that it would not be feasible. Consequently, in some cases, no plan of reorganization complying with the statutory standards would be possible. We submit that the Los Angeles case compels no such result.

The decision below in this regard is opposed in principle to a number of decisions of the lower federal courts and of the Interstate Commerce Commission in comparable reorganization cases. These authorities are collected in the brief filed on behalf of the petitioners in No. 444 (pp. 11–13) and consequently will not be further discussed in this brief.

CONCLUSION

We submit that the decision of the court below reversing the order confirming the plan of reorganization should be affirmed, but that the mandate of this Court should issue in such form that the District Court may, upon proper findings of the necessity or desirability of unification, approve a plan of reorganization providing for unified operation of the enterprise by a single reorganized corporation, without any requirement that the full compensation which each class of security holders is to be accorded for the value of its interests be given

out of the particular assets subject to its claims. Respectfully submitted,

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APPENDIX

The applicable provisions of the Bankruptcy Act, as they existed prior to the 1938 amendments (11 U. S. C. Supp. V, § 1 et seq.), are as follows:

Sec. 57 (h) (11 U. S. C. § 93 (h)):

The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Sec. 57 (m) (11 U. S. C. §93 (m)):

The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

Sec. 63 (a) (11 U.S. C. § 103 (a)):

Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate

of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *

Sec. 77B (b) (11 U.S. C. § 207 (b)):

The term "creditors" shall inclade for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term "claims" includes debts. securities, other than stock, liens, or other interests of whatever character. In the case of secured claims entitled to the provisions of clause (5) of this subdivision (b), the value of the security shall be determined in the manner provided in section 57, clause (h) of this Act, and if the amount of such value shall be less than the amount of the claim, the excess may be classified as an unsecured claim.

Sec. 77B (f) (11 U.S.C. § 207 (f)):

After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *.

Sec. 77B (k) (11 U.S.C. § 207 (k)):

If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section

22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivision (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes. of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors"; "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication.

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SUPREME COURT OF THE UNITED STATES.

Nos. 400 and 444.—OCTOBER TERM, 1940.

Consolidated Rock Products Co., et al., Petitioners,

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E. Blois du Bois.

F. D. Badgley, et al., Petitioners, 444 vs.

E. Blois du Bois.

On Writs of Certiorari, to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 3, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

This case involves questions as to the fairness under § 77B of the Bankruptcy Act (48 Stat. 912) of a plan of reorganization for a parent corporation (Consolidated Rock Products Co.) and its two wholly owned subsidiaries—Union Rock Co. and Consumers Rock and Gravel Co., Inc. The District Court confirmed the plan; the Circuit Court of Appeals reversed. 114 F. (2d) 102. We granted the petitions² for certiorari because of the importance in the administration of the reorganization provisions of the Act of certain principles enunciated by the Circuit Court of Appeals.

The stock of Union and Consumers is held by Consolidated. Union has outstanding in the hands of the public³ \$1,877,000 of 6% bonds secured by an indenture on its property, with accrued and unpaid interest⁴ thereon of \$403,555—a total mortgage indebt-

¹ The proceed 's under § 77B were instituted in 1935 by the filing of separate voluntary petitions by Consolidated, Union and Consumers. No trustees have been appointed, Consolidated remaining in possession.

The petition in No. 400 raises all of the questions discussed herein, while the petition in No. 444 raises only the question as to the authority of the reorganization court to approve a plan which substitutes one mortgage covering all of the property for so-called divisional mortgages on separate units of that property. The Interstate Commerce Commission and the Securities and Exchange Commission filed memoranda urging that the petition in No. 444 be granted and that the petition in No. 400 be granted to the extent that it raised the same question as that presented by the petition in No. 444.

^{3 \$102,500} face amount of Union's bonds are held by Consolidated.

⁴ As of April 1, 1937, the effective date of the plan. Interest on Union bonds has been in default since March 1, 1934.

edness of \$2,280,555. Consumers has outstanding in the hands of the public⁵ \$1,137,000 of 6% bonds secured by an indenture on its property, with accrued and unpaid interest⁶ thereon of \$221,715—a total mortgage indebtedness of \$1,358,715. Consolidated has outstanding 285,947 shares of no par value preferred stock⁷ and 397, 455 shares of no par common stock.

The plan of reorganization calls for the formation of a new corporation to which will be transferred all of the assets of Consolidated, Union, and Consumers free of all claims. The securities of the new corporation are to be distributed as follows:

Union and Consumers bonds held by the public will be exchanged for income bonds¹⁰ and preferred stock¹¹ of the new company. For 50 per cent of the principal amounts of their claims, those bondholders will receive income bonds secured by a mortgage on all of the property of the new company; for the balance they will receive an equal amount of par value preferred stock. Their claims to accrued interest are to be extinguished, no new securities being issued therefor. Thus Union bondholders for their claims of \$2,280,555 will receive income bonds and preferred stock in the fare amount of \$1,877,000; Consumers bondholders for their claims of \$1,358,715 will receive income bonds and preferred stock¹²

^{5 \$63,500} face amount of Consumer's bonds are held by Consolidated.

⁶ Interest has been in default since July 1, 1934.

⁷ With a preference on liquidation of \$25 per share plus accrued dividends.

⁸ Reliance Rock Co. is a wholly owned subsidiary of Union whose properties also were to be transferred to the new company.

⁹ The claims of general creditors will be paid in full or assumed by the new complany.

¹⁰ These bonds will mature in 20 years and will bear interest at the rate of 5 per cent if earned. The interest will be cumulative if not paid. The bonds, as well as the preferred stock, to be issued to Union and Consumers bondholders will be in separate series. The net income of the new company is to be divided into two equal parts: each part to be used to pay, with respect to bonds and preferred stock of each series, first, interest and sinking fund payments on the bonds; second, dividends and sinking fund payments on the preferred stock. Income remaining will be available for general corporate purposes.

¹¹ The new preferred stock will have a par value of \$50 and will earry a dividend of 5 per cent. It will be noncumulative until the retirement of the bonds of the same series except to the extent that net income is available for dividends. Thereafter it will be cumulative.

¹² All of the new income bonds and preferred stock are to be issued to the public holders of Union and Consumers bonds.

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in the face amount of \$1,137,000. Each share of new preferred stock will have a warrant for the purchase of two shares of new \$2 par value common stock at prices ranging from \$2 per share within six months of issuance, to \$6 per share during the fifth year after issuance.

Preferred stockholders of Consolidated will receive one share of new common stock (\$2 par value) for each share of old preferred or an aggregate of 285,947 shares of new common.

A warrant to purchase one share of new common for \$1 within three months of issuance will be given to the common stockholders of Consolidated for each five shares of old common.¹³

The new preferred stock, to be received by the old bondholders, will elect four out of nine directors of the new company; the new common stock will elect the remainder. But on designated d linquencies in payment of interest on the new bonds, the old bondholders would be entitled to elect six of the nine directors.

The bonds of Union and Consumers held by Consolidated, 15 the stock of those companies held by Consolidated, and the intercompany claims (discussed hereafter) will be cancelled.

In 1929 when Consolidated acquired control of these various properties, they were appraised in excess of \$16,000,000 and it was estimated that their annual net earnings would be \$500,000. In 1931 they were appraised by officers at about \$4,400,000, "exclusive of going concern, good will and current assets." The District Court did not find specific values for the separate properties of Consolidated, Union, or Consumers, or for the properties of the enterprise as a unit. The average of the valuations (apparently based on physical factors) given by three witnesses at the hearing before the master were \$2,202,733 for Union as against a mortgage indebtedness of \$2,280,555; \$1,151,033 for Consumers as against a mortgage indebtedness of \$1,358,715. Relying on similar testimony, Consolidated argues that the value of its property, to

^{13 79,491} shares of new common will be reserved for the exercise of warrants issued to old common stockholders; an additional 60,280 shares of new common, for the exercise of warrants attached to the new preferred.

¹⁴ It is apparent that the majority of the new common will be held by the old preferred stockholders even if all warrants are exercised.

¹⁵ See notes 3 and 5, supra.

¹⁶ Two officers and one ex-employee. These valuation figures included the properties of Reliance. See note 8, supra.

be contributed to the new company, is over \$1,359,000, or exclusive of an alleged good will of \$500,000, \$859,784. These estimated values somewhat conflict with the consolidated balance sheet (asat June 30, 1938) which shows assets of \$3,723,738.15 and liabilities (exclusive of capital and surplus) of \$4,253,224.41. More important, the earnings record of the enterprise casts grave doubts on the soundness of the estimated values. No dividends were ever paid on Consolidated's common stock; and except for five quarterly dividends in 1929 and 1931, none on its preferred stock. For the eight and a half years from April 1, 1929, to September 30, 1937. Consolidated had a loss of about \$1,200,000 before bond interest but after depreciation and depletion. And except for the year 1929, Consolidated had no net operating profit, after bond interest and amortization, depreciation and depletion, in any year down to September 30, 1937.17 Yet on this record the District Court found that the present fair value of all the assets of the several companies, exclusive of good will and going concern value, was in excess of the total bonded indebtedness, plus accrued and unpaid interest. And it also found that such value, including good will and going concern value, was insufficient to pay the bonded indebtedness plus accrued and unpaid interest and the liquidation preferences and accrued dividends on Consolidated preferred stock. It further found that the present fair value of the assets admittedly subject to the trust indentures of Union and Consumers was insufficient to pay the face amount, plus accrued and unpaid interest of the respective bond issues. In spite of that finding, the District Court also found that "it would be physically impossible to determine and segregate with any degree of accuracy or fairness properties which originally belonged to the companies separately"; that as a result of unified operation properties of every character "have been commingled and are now in the main held by Consolidated without any way of ascertaining what part, if any thereof, belongs to each or any of the companies separately"; and that, as a consequence, an appraisal "would be of such an indefinite and unsatisfactory nature as to produce further confusion."

The unified operation which resulted in that commingling of assets was pursuant to an operating agreement which Consolidated

¹⁷ The hearings on the plan were held before a master during November, 1937.

caused its wholly owned subsidiaries18 to execute in 1929. Under that agreement the subsidiaries ceased all operating functions and the entire management, operation and financing of the business and properties of the subsidiaries were undertaken by Consolidated. The corporate existence of the subsidiaries, however, was maintained and certain separate accounts were kept. Under this agreement Consolidated undertook, inter alia, to pay the subsidiaries the amounts necessary for the interest and sinking fund provisions of the indentures and to credit their current accounts with items of depreciation, depletion, amortization and obsolescence. 19 Upon termination of the agreement the properties were to be returned and a final settlement of accounts made, Consolidated meanwhile to retain all net revenues after its obligations thereunder to the subsidiaries had been met. It was specifically provided that the agreement was made for the benefit of the parties, not "for the benefit of any third person." Consolidated's books as at June 30, 1938, showed a net indebtedness under that agreement to Union and Consumers of somewhat over \$5,000,000. That claim was cancelled by the plan of reorganization, no securities being issued to the creditors of the subsidiaries therefor. The District Court made no findings as respects the amount or validity of that intercompany claim; it summarily disposed of it by concluding that any liability under the operating agreement was "not made for the benefit of any third parties and the bondholders are included in that category."

We agree with the Circuit Court of Appeals that it was error to confirm this plan of reorganization.

I. On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, the court was in no position to exercise the "informed, inde-

is This agreement covered the properties of Reliance as well as Union and Consumers. By a modification made in 1933 the agreement was to expire in February, 1938, Consolidated having an option to extend the agreement for another five years on specified notice.

¹⁹ The agreement was modified in 1933 (by two officers acting for each of the four companies) whereby the depreciation to be credited to the subsidiaries should be credited only on termination of the agreement. At that time Consolidated was to have the right by paying a five per cent penalty, to pay twenty-five per cent of the amount of the depreciation credit in ten annual installments and the balance at the end of ten years from the date of termination. Some question has been raised as to the propriety of that modification, a question on which we express no opinion.

pendent judgment" (National Surety Co. v. Coriell, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails. Case v. Los Angeles Lumber Products Co., 308 U. S. 106. And see First National Bank v. Flershem, 290 U. S. 504, 525. There are two aspects of that valuation problem.

In the first place, there must be a determination of what assets are subject to the payment of the respective claims. This obvious requirement was not met. The status of the Union and Consumers bondholders emphasizes its necessity and importance. According to the District Court the mortgaged assets are insufficient to pay the mortgage debt. There is no finding, however, as to the extent of the deficiency or the amount of unmortgaged assets and their value. It is plain that the bondholders would have, as against Consolidated and its stockholders, prior recourse against any unmortgaged assets of Union and Consumers. The full and absolute priority rule of Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, and Case v. Los Angeles Lumber Products Co., supra, would preclude participation by the equity interests in any of those assets until the bondholders had been made whole. Here there are some unmortgaged assets, for there is a claim of Union and Consumers against Consolidated—a claim which according to the books of Consolidated is over \$5,000,000 in amount. If that claim is valid.20 or even if it were allowed only to the extent of 25% of its face amount,21 then the entire assets of Consolidated would be drawn down into the estates of the subsidiaries. In that event Union and Consumers might or might not be solvent in the bankruptcy sense. But certainly it would render untenable the present contention of Consolidated and the preferred stockholders that they are contributing all of the assets of Consolidated to the new company in exchange for which they are entitled to new securities. theory of the case they would be making a contribution of only such assets of Consolidated, if any, as remained after any deficiency of the bondholders had been wholly satisfied.

²⁰ Consolidated seems to admit that that claim is valid, at least to the extent of net current liabilities aggregating more than \$250,000 as of June 30, 1938.

²¹ Respondent points out that even on the basis of a \$3,300,000 valuation of the properties of Union and Consumers depreciation, depletion and obsolescence charges would be approximately \$1,250,000.

There are no barriers to a valuation and enforcement of that claim. If as Consolidated maintains the subsidiaries have no present claim against it,22 the claim can readily be discounted to present worth. It is provable by trustees of the subsidiaries, for the term "creditors" under § 77B(b) includes "holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."23 Consolidated makes some point of the difficulty and expense of determining the extent of its liability under the operating agreement and of the necessity to abide by the technical terms of that agreement²⁴ in ascertaining that liability. But equity will not permit a holding company, which has dominated and controlled its . subsidiaries, to escape or reduce its liability to those subsidiaries by reliance upon self-serving contracts which it has imposed on them. A holding company, as well as others in dominating or controlling positions (Pepper v. Litton, 308 U. S. 295), has fiduciary duties to security holders of its system which will be strictly enforced. See Taylor v. Standard Gas & Electric Co., 306 U. S. 307. In this connection Consolidated cannot defeat or postpone the accounting because of the clause in the operating agreement that it was not made for the benefit of any third person. The question here is not a technical one as to who may sue to enforce that liability. It is merely a question as to the amount by which Consolidated is indebted to the subsidiaries and the proof and allowance of that claim. The subsidiaries need not be sent into state courts to have that liability determined. The bankruptcy court having exclusive jurisdiction over the holding company and the subsidiaries has plenary power to adjudicate all the issues pertaining to

²² Consolidated maintains that there is no present claim against it because no claim exists until termination of the operating agreement which ran until February 1938, with an option in Consolidated to extend it for five years. But it does not assert, nor does the record show, that the option was exercised. But even if it had been, only the time when the amounts accrued were payable would be affected.

²³ For an equally broad definition of "creditor" under Ch. X of the Chandler Act (52 Stat. 840) see § 106(1) and (4).

²⁴ Thus Consolidated argues that under the operating agreement the machinery for an appraisal provided therein must be employed. Yet assuming arguendo that that is true, Consolidated which has been in possession and control throughout cannot rely on the failure to have an appraisal as a reason for blocking or delaying its duty to account.

the claim. The intimations of Consolidated that there must be foreclosure proceedings and protracted litigation in state courts involve a misconception of the duties and powers of the bankruptcy court. The fact that Consolidated might have a strategic or auisance value outside of § 77B does not detract from or impair the power and duty of the bankruptcy court to require a full accounting as a condition precedent to approval of any plan of reorganization. The fact that the claim might be settled, with the approval of the Court after full disclosure and notice to interested parties, does not justify the concealed compromise effected here through the simple expedient of extinguishing the claim.

So far as the ability of the bondholders of Union and Consumers to reach the assets of Consolidated on claims of the kind covered by the operation agreement is concerned, there is another and more direct route which reaches the same end. a unified operation of those several properties by Consolidated pursuant to the operating agreement. That operation not only resulted in extensive commingling of assets. All management functions of the several companies were assumed by Consolidated. sidiaries abdicated. Consolidated operated them as mere departments of its own business. Not even the formalities of separate corporate organizations were observed, except in minor particulars such as the maintenance of certain separate accounts. these facts, Consolidated is in no position to claim that its assets are insulated from such claims of creditors of the subsidiaries. To the contrary, it is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is reresponsible for the obligations of those subsidiaries incurred or arising during its management. Davis v. Alexander, 269 U. S. 114. 117; Joseph R. Foard Co. v. State of Maryland, 219 Fed. 827. 829; Stark Electric R. Co. v. M'Ginty Contracting Co., 238 Fed. 657, 661-663; The Willem Van Driel, Sr., 252 Fed. 35, 37-39; Luckenbach S.S. Co. v. W. R. Grace & Co., 267 Fed. 676, 681; Costan v. Manila Electric Co., 24 F. (2d) 383; Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F. (2d) 265, 267; Dillard & Coffin Co. v. Richmond Cotton Oil Co., 140 Tenn. 290. We are not dealing here with a situation where other creditors of a parent company are competing with creditors of its subsidiaries. If meticulous regard to corporate forms, which Consolidated has long ignored, is now observed, the stockholders of Consolidated may be the direct beneficiaries. Equity will not countenance such a result. A holding company which assumes to treat the properties of its subsidiaries as its own cannot take the benefits of direct management without the burdens.

We have already noted that no adequate finding was made as to the value of the assets of Consolidated. In view of what we have said, it is apparent that a demaination of that value must be made so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole.

There is another reason why the failure to ascertain what assets are subject to the payment of the Union and Consumers bonds is fatal. There is a question raised as to the fairness of the plan as respects the bondholders inter sese. While the total mortgage debt of Consumers is less than that of Union, the net income of the new company, as we have seen,25 is to be divided into two equal parts, one to service the new securities issued to Consumers bondholders, the other to service those issued to Union bondholders. cation is attacked here by respondent as discriminatory against Union, on the ground that the assets of Union are much greater in volume and in value than those of Consumers. It does not appear from this record that Union and Consumers have individual earnings records. If they do not, some appropriate formula for at least an approximate ascertainment of their respective assets must be designed in spite of the difficulties oceasioned by the commingling. Otherwise the issue of fairness of any plan of reorganization as between Union and Consumers bondholders cannot be intelligently resolved.

In the second place, there is the question of the method of valuation. From this record it is apparent that little, if any, effort was made to value the whole enterprise by a capitalization of prospective earnings. The necessity for such an inquiry is emphasized by the poor earnings record of this enterprise in the past. Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of re-

²⁵ Supra, note 10.

organization. Whether or not the earnings may reasonably be expected to meet the interest and dividend requirements of the new securities is a sine qua non to a determination of the integrity and practicability of the new capital structure. It is also essential for satisfaction of the absolute priority rule of Case v. Los Angeles Lumber Products Co., supra. Unless meticulous regard for earning capacity be had, indefensible participation of junior securities in plans of reorganization may result.

As Mr. Justice Holmes said in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 226, "the commercial value of property consists in the expectation of income from it." And see Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U. S. 439, 445. Such criterion is the appropriate one. here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties. It is/plain that valuations for other purposes are not relevant to or helpful in a determination of that issue, except as they may indirectly bear on earning capacity. Temmer v. Denver Tramway Co. 18 F. (2d) 226, 229; New York Trust Co. v. Continental & Commercial Trust & Sav. Bank, 26 F. (2d) 872, 874. The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. In re Wickwire Spencer Steel Co., 12 F. Supp. 528, 533; 2 Bonbright, Valuation of Property, pp. 870-881, 884-893. Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance. A sum of values based on physical factors and assigned to separate units of the property without regard to the earning capacity of the whole enterprise is plainly inadequate. See Finletter, The Law of Bankruptcy Reorganization, pp. 557 et seq. But hardly more than that was done here. The Circuit Court of Appeals correctly left the matter of a formal appraisal to the

discretion of the District Court. The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case.

II. The Circuit Court of Appeals held that the absolute priority rule of Northern Pacific Railway Co. v. Boyd, supra, and Case v. Los Angeles Lumber Products Co., supra, applied to reorganizations of solvent as well as insolvent companies. That is true. Whether a company is solvent or insolvent in either the equity or the bankruptcy sense, "any arrangement of the parties by which the subordinated rights and interests of the stockholders are attempted to be secured at the expense of the prior rights" of creditors "comes within judicial denunciation". Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co., 174 U. S. 674, 684. And we indicated in Case v. Los Angeles Lumber Products Co., supra, that that rule was not satisfied even though the "relative priorities" of creditors and stockholders were maintained (pp. 119-120).

The instant plan runs afoul of that principle. In the first place, no provision is made for the accrued interest on the bonds. interest is entitled to the same priority as the principal. See American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261, 266-267; Ticonic National Bank v. Sprague, 303 U. S. 406. In the second place, and apart from the cancellation of interest, the plan does not satisfy the fixed principle of the Boyd case even on the assumption that the enterprise as a whole is solvent in the bankruptcy sense. The bondholders for the principal amount of their 6% bonds receive an equal face amount of new 5% income bonds and preferred stock, while the preferred stockholders receive new common stock. True, the relative priorities are maintained. But the bondholders have not been made whole. have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. Those lost rights are of value. Full compensatory provision must be made for the entire bundle of rights which the creditors surrender.

The absolute priority rule does not mean that bondholders cannot be given inferior grades of securities, or even securities of the same

grade as are received by junior interests. Requirements of feasibility26 of reorganization plans frequently necessitate it in the interests of simpler and more conservative capital structures. And standards of fairness permit it. This was recognized in Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445. This Court there said (p. 455) that though "to the extent of their debts creditors are entitled to priority over stockholders against all the property." of the debtor company, "it does not follow that in every reorganization the securities offered to general creditors must be superior in rank or grade to any which stockholders may obtain. It is not impossible to accord to the creditor his superior rights in other ways." And the Court went on to say (p. 456), "No offer is fair which does not recognize the prior rights of creditors . . .: but circumstances may justify an offer of different amounts of the same grade of securities to both creditors and stockholders." Thus it is plain that while creditors may be given inferior grades of securities, their "superior rights" must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating in the plan, if creditors are given only a face amount of inferior securities equal to the face amount of their claims. They must receive, in addition, compensation for the senior rights which they are to surrender. If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible. The plan then comes within judicial denunciation because it does not recognize the creditors' "equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation". Kansas City Terminal Ry. Co. v. Central Union Trust Co., supra, p. 454.

Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case. As indicated in the Boyd case (228 U. S. at p. 508) the creditors are entitled to have the full value of the property, whether "present or prospective, for dividends or only for purposes of control", first appropriated to payment of their claims. But whether in case of a solvent company the creditors should be made whole for the change in or loss of their seniority by an increased participation in assets, in earnings or in control, or in any combination thereof, will be dependent on

²⁶ Sec. 77B(f)(1).

the facts and requirements of each case.²⁷ So long as the new securities offered are of a value equal to the creditors' claims, the appropriateness of the formula employed rests in the informed discretion of the court.

The Circuit Court of Appeals, however, made certain statements which if taken literally do not comport with the requirements of the absolute priority rule. It apparently ruled that a class of claimants with a lien on specific properties must receive full compensation out of those properties, and that a plan of reorganization is per se unfair and inequitable if it substitutes for several old bond issues, separately secured, new securities constituting an interest in all of the properties. That does not follow from Case v. Los Angeles Lumber Products Co., supra. If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of "fair and equitable" are satisfied.

Any other standard might well place insuperable obstacles in the way of feasible plans of reorganization. Certainly where unified operations of separate properties are deemed advisable and essential, as they were in this case, the elimination of divisional mortgages may be necessary as well as wise. Moreover, the substitution of a simple, conservative capital structure for a highly complicated one may be a primary requirement of any reorganization plan. There is no necessity to construct the new capital structure on the framework of the old.

Affirmed.

²⁷ In view of the condition of the record relative to the value of the properties and the fact that the accrued interest is cancelled by the plan, it is not profitable to attempt a detailed discussion of the deficiencies in the alleged' compensatory treatment of the bondholders. It should, however, be noted as respects the warrants issued to the old common stockholders that they admittedly have no equity in the enterprise. Accordingly, it should have been shown that there was a necessity of seeking new money from them and that the participation accorded them was not more than reasonably equivalent to their contribution. Kansas City Terminal Ry. Co. v. Central Union Trust Co., supra: Case v. Los Angeles Lumber Products Co., supra, pp. 121-122. In the latter case we warned against the dilution of creditors' rights by inadequate contributions by stockholders. Here that dilution takes a rather obvious form in view of the lower price at which the stockholders may exercise the warrants. Warrants exercised by them would dilute the value of common stock purchased by bondholders during the same period. Furthermore, on Consolidated's estimate of the equity in the enterprise, the values of the new common would have to increase many fold to reach a value which exceeds the warrant price by the amount of the accrued interest.